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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 55

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC., PETITIONER,

vs.

AMERICAN OIL COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 3, 1964
CERTIORARI GRANTED MAY 18, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14183

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Plaintiff-Appellee,

vs.

AMERICAN OIL COMPANY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Honorable George N. Beamer, District Judge.

Joint Appendix—Filed July 16, 1963

[File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION
Hammond Civil 3090

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,

vs.

AMERICAN OIL COMPANY, a Maryland corporation.

DOCKET ENTRIES

6- 2-61	Complaint filed. Summons issued and given to Marshal.
6-10-61	Summons returned served upon Amer. Oil Co. by serving J. E. Engle, Safety Director, 6-7-61. (3-40).

6-24-61 Defendant American Oil Co. files motion under Rule 12 of the Federal Rules of Civil Procedure, with brief and affidavit of service attached.

10-25-61 Pltf. Independent Petroleum Workers of America, Inc. file Motion for Summary Judgment Pursuant to Rule 56 together with Affidavit in Support thereof attached thereto.

9- 6-62 Order entered denying defendant's motion to make more definite and certain as to paragraphs 10 and 11 of complaint; granting defendant's motion to strike out the words "work" and [fol. 2] "working" in para. 4 of the complaint and granting motion to make more definite and certain as to para. 5 of complaint (SE) Beamer: J (copies to counsel).

10- 5-62 Amended complaint for violation of and to enforce a collective bargaining agreement. Request of the plaintiff for admission of facts filed.

10-11-62 Verified Answer of Defendant, American Oil Co. to Request of Plaintiff for Admissions of Fact under Rule 36 filed with Certificate of Service attached thereto.

11-13-62 Plaintiff files motion for summary judgment with brief in support of same. (Brief in file forwarded to Judge Beamer in So. Bend. 11-14-62).

1-11-63 Defendant, American Oil Co., files Answer to Amended Complaint with Certificate of Service attached thereto.

2-13-63 Defendant American Oil Company files Motion for Summary Judgment, with Affidavit attached thereto. Brief in support filed. Certificate of Service filed.

2-27-63 Reply Brief in Answer to Defendants Brief in Support of Motion for Summary Judgment filed. Affidavit in Response to Defendants Motion for Summary Judgment as to Legal Par. II filed.

3- 1-63 Parties present by counsel for hearing on cross-motions for summary judgment. Arguments heard as to Par. I of complaint. Arguments heard as to Par. II of complaint. Matter submitted and taken under advisement.

3-13-63 Order: The motion of the plaintiff for summary judgment as to Paragraph I of the amended complaint is granted. Defendant's motion for Summary Judgment as to Paragraph I of the [fol. 3] amended complaint is denied. Defendant's Motion For Summary Judgment as to Paragraph II of the Amended Complaint is denied. Since the questions raised by Paragraph II of the amended complaint are now moot, Paragraph II is ordered dismissed (SE). Beamer: J (copies to counsel)/Memo attached thereto.

3-13-63 Judgment and Decree entered (SE). Beamer: J. This cause coming on to be heard on the respective Motions For Summary Judgment filed by the plaintiff and defendant and the court having heard the argument of counsel and being fully advised in the premises, the court having rendered an order and memorandum of decision, it is therefore Ordered, Adjudged and Decreed that there is no genuine issue as to any material fact herein and the prayer of the plaintiffs complaint is hereby granted; the defendant, American Oil Company, a Maryland corporation, is hereby ordered to join with the plaintiff in the submission of the grievance described in the complaint to arbitration in accordance with the provisions of the collective bargaining agreement between the parties attached to the complaint as Exhibit A, and judgment decree for costs is hereby rendered against the defendant. (SE). Beamer: J (copies to counsel).

4- 9-63 Defendant American Oil Company files notice of appeal. Clerks certificate of filing of notice filed. (copies to counsel).

4-10-63 Cash appeal bond deposited in registry of court, in sum of $250.00, by Tinkham, Beckman, Kelly.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

3090

AMENDED COMPLAINT FOR VIOLATION OF, AND TO ENFORCE A COLLECTIVE BARGAINING AGREEMENT—Filed October 5, 1962

Now Comes the plaintiff, by Green, Powers, Belshaw & Danko, its attorneys, and complaining of the defendant, alleges and says:

Legal Paragraph I.

1. That the plaintiff is a not-for-profit corporation organized under the laws of the State of Indiana, and is a labor organization representing employees in an industry affecting commerce as defined in the Labor-Management Relations Act, 1947, as amended, Chapter 120, Title III, Section 301, 61 Statutes 156, 29 U. S. C., Section 185, p. 140 et seq.;

2. That the defendant is a corporation duly organized under the laws of the State of Maryland, and is duly admitted to do business in the State of Indiana, and is an employer in an industry affecting commerce as so defined;

3. That on or about the 12th day of September, 1960, there was in full force and effect Section 301 (a) and (c) of Public Law No. 101, as amended by Public Law No. 189, and being Section 301 of the Labor Management Relations Act, 1947, as amended, and cited as aforesaid, and that this action arises thereunder, which section of which law more specifically provides as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, [fol. 5] may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties;

(c) For the purposes of actions and proceedings by or against labor organizations in the District Courts of the United States, District Courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

4. That at said time, there was in full force and effect between the plaintiff and the defendant's antecedent a certain agreement regarding hours, wages and other conditions of employment of certain employees of the defendant at its Whiting, Indiana, refinery, which agreement, in pertinent part, was set forth in Exhibit "A," heretofore appended to the complaint, and which exhibit is now made an exhibit to this amended complaint by reference;

5. That at said time, said agreement provided a grievance procedure for the determination of certain disputes which might arise between the parties, which grievance procedure culminated in compulsory arbitration, and that, in Article II, Section 10 (A) (1), the disputes referred to include grievances involving questions arising from alleged violations of the terms of said agreement;

6. That at said time, said agreement provided, in Article I, Section 1 thereof, that the defendant recognized the plaintiff as the sole and exclusive collective bargaining agent with respect to pay, wages, hours of employment, and other conditions of employment for certain employees at the said refinery, including employees whose rights were or might be affected by the grievance described in this complaint;

7. That on or about said date, the defendant assigned [fol. 6] certain crane operating work to persons not employed by it and not covered by said agreement, and did not cause such crane operating work to be performed by employees of the crane department;

8. That thereafter, in or about the 25th day of October, 1960, the plaintiff, by its institution of a grievance in ac-

cordance with the procedure outlined in said agreement, alleged that the defendant, by its assignment of such crane operating work, violated said agreement in that it failed to treat the plaintiff as the sole and exclusive collective bargaining agent as required thereby, and thereafter the plaintiff advanced the said grievance in accordance with the procedure established by said agreement, including the making of a request to the defendant for submission of the alleged violation to arbitration, in accordance with said procedure;

9. That thereafter, in or about the 9th day of February, 1961, the defendant refused to submit the said grievance to arbitration in accordance with the said procedure, as evidenced by Exhibit "B," heretofore appended to the complaint, and which exhibit is now made an exhibit to this amended complaint by reference, and the defendant continues to fail and continues to refuse to so submit said grievance.

Wherefore, the plaintiff prays for judgment, and for an order enforcing the subject collective bargaining agreement as to arbitration, and for an order of this court requiring the defendant to join in the submission of the involved issues to arbitration, as required by said subject agreement, and for its costs herein, and for all other and further relief in the premises.

[fol. 7] Legal Paragraph II.

1-4. The plaintiff here incorporates rhetorical paragraphs 1, 2, 3 and 4 of Legal Paragraph I as and for rhetorical paragraphs 1, 2, 3 and 4 of Legal Paragraph II, as though set forth in full herein;

5. That at said time, said agreement provided a grievance procedure for the determination of certain disputes which might arise between the parties, which grievance procedure culminated in compulsory arbitration, and that, in Article II, Section 10 (A)-(3), the disputes referred to included questions of alleged non-compliance with, modification of or discontinuance of any past policy, practice, custom or usage relative to working conditions;

6. That at said time, and at all times subsequent thereto, there was in existence at the said refinery, and in connection with the employees covered by said agreement, an established policy, practice, custom or usage relative to working conditions existing between the parties, whereby the defendant assigned all crane operating work to, and caused all such work to be performed by, employees of the crane department, provided that such employees were qualified by training to perform such work;

7. The plaintiff here incorporates rhetorical paragraph 7 of Legal Paragraph I as and for rhetorical paragraph 7 of Legal Paragraph II, as though set forth in full herein;

8. That thereafter, on or about the 25th day of October, 1960, the plaintiff, by its institution of a grievance in accordance with the procedure outlined in the said agreement, alleged that the defendant violated said established policy, practice, custom or usage relative to working conditions, which established policy, practice, custom or usage was a part of the said agreement, and that thereafter the plaintiff advanced the said grievance in accordance with [fol. 8] the procedure established by said agreement, including the making of a request to the defendant for submission of the question therein involved to arbitration, in accordance with said procedure;

9. The plaintiff here incorporates rhetorical paragraph 9 of Legal Paragraph I as and for rhetorical paragraph 9 of Legal Paragraph II, as though set forth in full herein.

Wherefore, the plaintiff prays for judgment, and for an order enforcing the subject collective bargaining agreement as to arbitration, and for an order of this court requiring the defendant to join in the submission of the involved issues to arbitration, as required by said subject agreement, and for its costs herein, and for all other and further relief in the premises.

Green, Powers, Belshaw & Danko, By William Belshaw, a member of the firm.

Green, Powers, Belshaw & Danko, 1430 119th Street, Whiting, Indiana, Telephone 659-0800.

[fol. 9]

STATEMENT WITH REFERENCE TO EXHIBIT "A" ATTACHED TO THE AMENDED COMPLAINT

Exhibit "A" attached to the complaint was the collective bargaining agreement between the plaintiff and the defendant. Only certain portions of this exhibit are pertinent to the appeal, which portions are "Article I, Recognition and Article II, Grievance Procedure." These articles read as follows (R. p. 5; pp. 1-9 of Exhibit):

Article I.

Recognition.

Section 1. The Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company under the supervisory jurisdiction of the Manufacturing and Research Departments at its Whiting, Indiana, plant; except confidential employees, all employees represented by Research and Engineering Professional Employees Association and by Office Employees Association, and all guards, professional employees and supervisors as defined by the National Labor Relations Act, as amended.

Section 2. The terms "Employee" or "Employees" as used herein, mean any person or persons covered by this Agreement as stated in Section 1 above.

Section 3. The Company agrees that it will not discriminate in any manner against any employee because of membership in or activities on behalf of the Union. The Union agrees that there will be no solicitation of members or performance of other Union activities on the property of the Company during the working hours of any employee engaged therein or affected thereby except as otherwise herein provided.

Section 4. The Union agrees that there shall be no intimidation or coercion of employees by the Union or any of its members or representatives.

[fol. 10]

Article II.

Grievance Procedure.

"Section 1. Questions upon which employees covered by this Agreement desire consideration, may be first presented by the employees to their immediate supervisor. An employee having a grievance case may contact his supervisor, who will, if requested, call a Union representative for a conference with the Management.

"Section 2. If a Union representative has questions eligible to be processed through the procedure herein provided, upon which such Union representative wishes to negotiate, he shall attempt first to settle the question through negotiations with the immediate supervisor of the employees in question.

"Section 3. If a question is not settled between the Union and the immediate supervisor within two (2) workdays, or an extension of that time mutually agreed upon, after negotiations start between the Union representative and the immediate supervisor, the Union may appeal to the division head of the employees in question.

"Section 4. If questions are not settled between the Union representative and the Company representative during the first stage of negotiations, the issue shall be reduced to writing and signed by the party who presented the issue for consideration.

"Section 5. If the question is not settled within six (6) workdays, or an extension of that time mutually agreed upon, between the Union and the division head, or those designated by him, the question may be appealed in the manner designated below to the Plant Manager by the Union. The Union representatives and the Manager, or those designated by him, shall hold semi-monthly meetings on the second and fourth Mondays of each month whenever there are questions which have not been settled, and at such meetings the

Union may be represented by not more than seven (7) accredited representatives and the representatives of [fol. 11] the Company will not exceed seven (7) in number. Not less than three (3) workdays in advance of the meetings with the Manager, the Union shall advise the Manager in writing concerning such questions which are to be considered at the meeting. Likewise, the Manager shall advise the Secretary of the Union in writing concerning questions which the Management may desire considered at the meeting.

"Section 6. Special meetings of the Manager, or those designated by him, and the Union for the purpose of considering questions of great urgency will be held not later than three (3) workdays after receipt by either party of notice from the other party that a special meeting is desired. Such notice shall clearly set forth the subject to be considered.

"Section 7. Notwithstanding the procedure for handling questions as set forth above in this Article, if the Union desires to bargain concerning a matter which involves the interests of employees under the jurisdiction of more than one supervisor within a division, it shall first bargain concerning said matter with the division head, or those designated by him. Furthermore, if the Union desires to bargain concerning a matter affecting the interests of employees in more than one division, it shall first bargain concerning said matter with the Manager of the Refinery, or those designated by him.

"Section 8. Any counterproposals made by either party at the Manager's level of bargaining shall be made in writing if requested by the other party. A Memorandum of Agreement shall be prepared and signed by both parties to cover any question which has been agreed upon if such Memorandum of Agreement is requested by either party.

"Section 9. If the question is not settled as the result of negotiations between the Manager, or those designated by him, and the Union within a period of

fifteen (15) workdays, or within an extension of that time mutually agreed upon, the Company or the Union may refer the subject for arbitration provided written [fol. 12] notice of intention so to do has first been served by the Union on the Manager of the Whiting Refinery or by the Company on the Union at least five (5) workdays before such action is taken. If the party on whom such notice is served does not indicate a desire to negotiate further on the question, the subject will be eligible for referral to arbitration. Should notice of the desire to negotiate further be served then such negotiations shall be considered as starting as of the date of the service of such notice, and if agreement is not reached within fifteen (15) calendar days thereafter, or an extension of time mutually agreed upon, the subject will be eligible for referral to arbitration for settlement.

"An Arbitrator shall be selected from a panel of five (5) Arbitrators designated by the Federal Mediation and Conciliation Service for each arbitration session. The decision of the Arbitrator shall be final and binding on both the Company and the Union. Neither party shall disclose in any manner to any Arbitrator any information concerning previous offers of settlement made by the other party.

"The Union and the Company shall bear equally the expenses and fees of any Arbitrator selected.

"Section 10. As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:

A. Questions which may be referred to arbitration shall be limited to:

1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.

2. Questions directly involving or arising from applications, intepretations, or alleged violations of the terms of arbitration awards and written agreements not incorporated in this Agreement.

3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to [fol. 13] working conditions, and grievances arising from:

(a) the modification by the Company of any of said policies, practices, customs and usages, or

(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or

(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement.

B. The foregoing limitations on arbitration shall not be applicable to Section 11 of Article IV, of this Agreement nor to the second sentence of Section 6(b) of the Memorandum of Agreement dated May 24, 1952, covering the apprenticeship plan.

C. In accordance with the provisions of Article XII of this Agreement neither party shall have the right to have any issue pertaining to benefit plans arbitrated.

D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate.

"Section 11. No grievance shall be considered unless it is presented in accordance with the procedure outlined above within three (3) months from the date on which the grievance arose. Any proposal handled under this grievance procedure shall be considered a [fol. 14] closed issue if such proposal is not referred to the next higher step in the grievance procedure within three (3) months after the date on which the proposal was presented to any step in the grievance procedure. In the event either party desires additional time beyond the three (3) months period in which to negotiate on an issue at any step in the grievance procedure, such extension may be granted by mutual consent of the parties.

"Section 12. Union representatives will be paid their regular rate of pay for such time as they spend during their working hours while conferring with the Management.

"Section 13. The Company agrees that the Management shall give the Union written notification of the foreman or other Management representatives who are designated to adjust grievances.

"Section 14. The Company agrees to notify a Union representative within two (2) workdays following the discharge of any employee, who, at the time of such discharge, has to his credit more than sixty (60) work periods at the Whiting Refinery. The Union agrees that no issue will be made relative to such discharged employee, if an issue is not raised prior to the expiration of fourteen (14) calendar days following the discharge of such employee. If the Management's action of discharging such employee is reversed, and the employee is reinstated with no disciplinary action being taken in lieu thereof, then the employee will be paid in full by the Company for all wages lost as a result of the discharge.

"Section 15. Nothing in this Agreement shall be construed as restricting the rights of individual employees or groups of individual employees to adjust

grievances with the Company through the channels of the Company's administrative organization. The Company agrees, however, that after a grievance has been referred to a Union representative and such representative has dealt with the foreman or the Management representatives with respect thereto, the Company will not enter into negotiations with the employee [fol. 15] or employees who originally presented the grievance or with the employee or employees affected by the grievance unless a representative of the Union is given an opportunity to be present at, and have a voice in such negotiations.

"Section 16. Questions concerning any liability or obligation of the Company, which require the construction or interpretation of any statute or law, for example but not by way of limitation, Fair Labor Standards Act; Workmen's Compensation laws; National Labor Relations Act as amended; and Social Security laws, shall not be eligible for processing through the grievance procedure. The provision of this Section will in no way prejudice or affect those rights of the parties as set forth in Section 9 and 10 of Article II of this Agreement, which arise solely under and by virtue of and are based entirely on the terms of this Agreement."

STATEMENT WITH REFERENCE TO EXHIBIT "B" ATTACHED TO THE AMENDED COMPLAINT

(This Exhibit which is a letter from American Oil Company to the union dated February 9, 1961, appears on sidefolio 23, printed page 20 of the Joint Appendix.)

[fol. 16]

IN THE UNITED STATES DISTRICT COURT

3090

REQUEST OF THE PLAINTIFF FOR ADMISSION OF FACTS—Filed October 15, 1962

To: Tinkham, Beckman, Kelly & Singleton
Attorneys at Law
708 Calumet Building
Hammond, Indiana

The plaintiff hereby requests the defendant's counsel, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit within ten (10) days after service of this request, for the purposes of the above-entitled action only, the truth of the allegations contained in rhetorical paragraphs 1 to 9, both inclusive, of Legal Paragraph 1, of the amended complaint heretofore served in the above-entitled cause.

Green, Powers, Belshaw & Danko, By William Belshaw, A member of the firm.

Green, Powers, Belshaw & Danko, 1450—119th Street, Whiting, Indiana. Telephone: 659-0800.

[fol. 17]

IN THE UNITED STATES DISTRICT COURT

3090

VERIFIED ANSWER OF DEFENDANT, AMERICAN OIL COMPANY, TO REQUEST OF PLAINTIFF FOR ADMISSIONS OF FACT UNDER RULE 36—Filed October 11, 1962

The defendant, American Oil Company, as and for its Answer to plaintiff's request to admit the truth of the allegations contained in rhetorical paragraphs 1 to 9, both inclusive, of Legal Paragraph 1, of the amended complaint herein alleges:

1. Defendant admits the allegations contained in rhetorical paragraph 1 of legal paragraph 1 of the amended complaint.

2. Defendant admits the allegations contained in rhetorical paragraph 2 of legal paragraph I of the amended complaint.

3. Defendant admits the allegations contained in rhetorical paragraph 3 of legal paragraph I of the amended complaint.

4. Defendant admits the allegations contained in rhetorical paragraph 4 of legal paragraph I of the amended complaint.

5. Answering the request for admission of the allegations contained in rhetorical paragraph 5 of legal paragraph I of the amended complaint, defendant admits that the agreement referred to therein by plaintiff contains a grievance procedure for the determination of certain disputes which grievance procedure culminates in arbitration; but defendant denies that the grievance procedure includes all grievances involving questions arising from alleged violations of the terms of said agreement.

6. Answering the request for admission of the allegations contained in rhetorical paragraph 6 of legal para- [fol. 18] graph I of the amended complaint, defendant admits that Article I, Section 1 of the agreement referred to in that paragraph provides that defendant recognizes the plaintiff as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for certain employees at the said refinery, but defendant denies that said clause includes any employees whose rights were or might be affected by the grievance described in the complaint and defendant denies that there were any employees whose rights were or might be affected by said grievance.

7. Defendant admits the allegations contained in rhetorical paragraph 7 of legal paragraph I of the amended complaint.

8. Answering the request for admission of the allegations contained in rhetorical paragraph 8 of legal paragraph I of the amended complaint, defendant admits that plaintiff instituted a grievance and admits that plaintiff made a request to the defendant for the submission of said

grievance to arbitration, but defendant denies that said grievance was one contemplated by the procedure outlined in said agreement.

9. Answering the request for admission of the allegations contained in rhetorical paragraph 9 of legal paragraph I of the amended complaint, defendant admits that defendant refused to submit the said grievance to arbitration, but defendant denies that the procedure referred to contemplated the submission of this particular grievance to arbitration.

J. C. Ducommun.

[fol. 19] *Duly sworn to by J. C. Ducommun, jurat omitted in printing.*

[fol. 20]

IN THE UNITED STATES DISTRICT COURT

3090

MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56—Filed November 13, 1962

Now Comes the plaintiff, by its counsel of record, and by way of Motion for Summary Judgment, alleges:

1. That the pleadings, being Legal Paragraph I of the amended complaint heretofore served in this cause, together with the affidavit appended to this motion, show that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as to said Legal Paragraph I as a matter of law;

2. That such judgment should be entered in favor of the plaintiff, together with costs.

Wherefore, the plaintiff prays for summary judgment and costs.

Green, Powers, Belshaw & Danko, By William Belshaw, Attorneys for Plaintiff.

Green, Powers, Belshaw & Danko, 1450—119th Street, Whiting, Indiana, Telephone: 659-0800.

[fol. 21]

IN THE UNITED STATES DISTRICT COURT

3090

AFFIDAVIT OF WILLIAM BELSHAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT UNDER RULE 56

State of Indiana,
County of Lake, ss.:

William Belshaw, being first duly sworn on oath, deposes and says:

1. That the allegations contained in rhetorical paragraphs 1 to 9, both inclusive, of the amended complaint heretofore served, being those rhetorical paragraphs in Legal Paragraph I of said amended complaint, are true, the contents of said aliegations being by reference made a part of this Affidavit;

2. That he has appended to this Affidavit, marked respectively, Exhibits B and C, which exhibits are by reference made a part of this Affidavit, photocopies of the grievance and refusal to arbitrate which were referred to in the said Legal Paragraph I of the said amended complaint;

3. That this Affidavit is made in support of the Motion for Summary Judgment filed herewith by the plaintiff, and for the purpose of inducing the Court to grant said Motion;

4. That this affiant is counsel for the plaintiff, has been so employed by it for a period in excess of fourteen (14) years, knows of his own knowledge that the facts alleged in the indicated rhetorical paragraphs of said Legal Paragraph I are true, assisted in the preparation of the collective bargaining agreement referred to herein, as-
[fol. 22] sisted in the preparation of the grievance statement referred to therein, and is sufficiently informed as to all other matters stated herein to make this Affidavit.

William Belshaw.

Subscribed and sworn to before me this 18th day of October, 1962.

Flora Libster,
Notary Public.

(Seal)

My commission expires: 11-21-62.

EXHIBIT B TO AFFIDAVIT OF WILLIAM BELSHAW

Independent Petroleum Workers of America, Inc.
Whiting, Indiana

Date 10-25-60

Proposal No. 60-105

The Board of Directors of the IPWA requests that, as required by the recognition clause of the applicable agreement and established past practice, policy, custom and usage, employees of the crane department be assigned and perform all crane operating work, as established by such past policy, practice, custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work, be compensated by the appropriate rate for all time and pay so lost.

Date Rec'd R. W. Mecklin. 10-26-60, 10:45 a. m.

Date Denied 11-22-60

By R. W. Mecklin.

By J. J. Sotak,
(Representative)

Div. No. 10 Dept. Crane.

[fol. 23]

EXHIBIT C TO AFFIDAVIT OF WILLIAM BELSHAW

(Letterhead of American Oil Company).

February 9, 1961

Independent Petroleum Workers of America, Inc.
1923 Clarke Street
Whiting, Indiana

Gentlemen:

Your letter of February 2, 1961, included among those cases listed by you for appeal to arbitration the case designated as Whiting 60-105.

During our November 28, 1960 meeting with you, we indicated in our discussion of your proposal on this case that we questioned its arbitrability. This will confirm our position that questions arising from or related to the issue in Whiting 60-105 are not eligible for arbitration either as to the merits or as to the arbitrability. We believe that such questions can properly be resolved only through the negotiation process at a time when our working Agreement is open for such negotiations.

In view of our position, which we are willing to defend in a court of law if necessary, we do not intend to proceed with referral to arbitration for such ineligible questions.

Very truly yours,

A. F. Endres.

[fol. 24]

IN THE UNITED STATES DISTRICT COURT

3090

ANSWER OF DEFENDANT, AMERICAN OIL COMPANY, TO AMENDED COMPLAINT—Filed January 11, 1963

First Defense.

Comes now the defendant, American Oil Company, by its attorneys, and for its defense to Legal Paragraph I of the amended complaint herein, alleges and says:

1. Defendant admits the material allegations contained in rhetorical paragraph 1 of legal paragraph I of the amended complaint.

2. Defendant admits the material allegations contained in rhetorical paragraph 2 of legal paragraph I of the amended complaint.

3. Defendant admits the material allegations contained in rhetorical paragraph 3 of legal paragraph I of the amended complaint.

4. Defendant admits the material allegations contained in rhetorical paragraph 4 of legal paragraph I of the amended complaint.

5. Defendant denies each and all of the allegations contained in rhetorical paragraph 5 of legal paragraph I of the amended complaint.

6. Defendant denies each and all of the allegations contained in rhetorical paragraph 6 of legal paragraph I of the amended complaint.

7. Defendant admits the material allegations contained in rhetorical paragraph 7 of legal paragraph I of the amended complaint.

8. Defendant denies each and all of the allegations contained in rhetorical paragraph 8 of legal paragraph I of the amended complaint.

[fol. 25] 9. Answering rhetorical paragraph 9 of legal paragraph I of the amended complaint, defendant admits that it refused to submit the said grievance to arbitration and denies all of the other allegations contained in said rhetorical paragraph.

Wherefore, defendant prays judgment for its costs herein expended.

Second Defense.

Comes now the defendant, American Oil Company, by its attorneys, and for its defense to the allegations of Legal Paragraph II of the amended complaint herein, alleges and says:

1-4. For its answer to rhetorical paragraphs 1, 2, 3 and 4 of legal paragraph II of the amended complaint, defendant incorporates herein its answers to rhetorical paragraphs 1, 2, 3 and 4 of legal paragraph I of the amended complaint and makes the same a part hereof the same as though restated herein.

5. Defendant denies each and all of the allegations contained in rhetorical paragraph 5 of legal paragraph II of the amended complaint.

6. Defendant denies each and all of the allegations contained in rhetorical paragraph 6 of legal paragraph II of the amended complaint.

7. For its answer to rhetorical paragraph 7 of legal paragraph II of the amended complaint, defendant incorporates herein its answer to rhetorical paragraph 7 of legal paragraph I of the amended complaint and makes the same a part hereof the same as though restated herein.

8. Defendant denies each and all of the allegations contained in rhetorical paragraph 8 of legal paragraph II of the amended complaint.

9. For its answer to rhetorical paragraph 9 of legal paragraph II of the amended complaint, defen- [fol. 26] dant incorporates herein its answer to rhetorical paragraph 9 of legal paragraph I of the amended complaint and makes the same a part hereof the same as though restated herein.

Wherefore, defendant prays judgment for its costs herein expended.

Third Defense.

For third and further defense to the amended complaint herein, defendant alleges:

1. That heretofore on the 8th day of December, 1958, the plaintiff herein brought an action in the United States District Court for the Northern District of Indiana, Hammond Division, Civil No. 2518, against the defendant named herein; that defendant was duly notified of the pendency

of said action by the service of summons and that thereafter defendant appeared to said cause of action and filed its answer to plaintiff's complaint therein.

2. That the issue presented in the complaint filed by plaintiff on December 8, 1958, known as Civil No. 2518, was identical to the issue presented in the instant complaint; namely, the arbitrability of a grievance filed by the plaintiff which questions the right of defendant to contract out certain work at its refinery in Whiting, Indiana.

3. That thereafter plaintiff and defendant stipulated the facts in the action known as Civil No. 2518 and a trial of said cause was had upon the facts as so stipulated in the United States District Court for the Northern District of Indiana, Hammond Division, and upon the issues so joined.

4. That after a full and complete hearing on the issues as established by the stipulation of facts, the United States District Court for the Northern District of Indiana, Ham- [fol. 27] mond Division, entered a judgment and decree on August 10, 1959, which said judgment was in favor of defendant and decreed that defendant was not required to arbitrate its right to contract out work at its refinery in Whiting, Indiana.

5. That thereafter plaintiff appealed the judgment and decree entered by the district court in favor of defendant to the Court of Appeals and on March 2, 1960, the United States Court of Appeals for the 7th Circuit affirmed the judgment of the district court.

6. Defendant further alleges that the issues as presented in plaintiff's complaint herein are the same issues presented in the plaintiff's complaint in said former action; that plaintiff herein was the plaintiff in said former action and that defendant herein, American Oil Company, is the successor corporation to defendant in said former suit; Standard Oil Company, and that there were no other or different parties in said former action.

7. That the said United States District Court for the Northern District of Indiana, Hammond Division, had

jurisdiction of the subject matter and of the parties; that by said complaint and answer, the merits of said cause of action were put in issue, and the judgment of the district court thereon was upon and covered all of the issues of said cause of action that were litigated and that might or could have been litigated under said issues so joined.

8. That by reason of the premises, the cause of action set out and sued upon in plaintiff's complaint herein has been, by said former proceedings in the United States District Court for the Northern District of Indiana, Hammond Division, as aforesaid, fully adjudicated; that plaintiff has been granted a full and complete opportunity to present its claim against this defendant in said former action.

[fol. 28] Wherefore, defendant prays judgment for its costs herein expended.

Daniel F. Kelly, Donald L. Hastings, D.F.K., Palmer Singleton Jr., D.F.K.; Attorneys for Defendant, American Oil Company, Inc.

Tinkham, Beckman, Kelly and Singleton; 708 Calumet Building, Hammond, Indiana. Telephone: Westmore 3-0482.

In the United States District Court

3090

Motion of the Defendant, American Oil Company, for Summary Judgment—Filed February 13, 1963

Comes now the defendant, American Oil Company, by Donald L. Hastings, Richard P. Tinkham, John F. Beckman, Jr., Daniel F. Kelly, and Palmer C. Singleton, Jr., its attorneys, and moves the Court to enter summary judgment in favor of the defendant, American Oil Company, and against the plaintiff, Independent Petroleum Workers of America, Inc., on plaintiff's amended complaint in two paragraphs, in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure.

In support of said motion for summary judgment, defendant submits herewith the affidavit of A. F. Endres, which is attached hereto and made a part hereof.

Donald L. Hastings, Richard P. Tinkham, John F. Beckman, Daniel F. Kelly, Attorneys for defendant, American Oil Company.

[fol. 29]

IN THE UNITED STATES DISTRICT COURT

3090

AFFIDAVIT OF A. F. ENDRES IN SUPPORT OF MOTION OF THE DEFENDANT, AMERICAN OIL COMPANY, FOR SUMMARY JUDGMENT.

State of Indiana,
County of Lake, ss.:

A. F. Endres, being first duly sworn upon his oath, deposes and says: That he is the Plant Manager of the Whiting Refinery of American Oil Company, defendant in the above-entitled action; that the action is brought pursuant to the provisions of Section 301 of the Labor Management Relations Act and requests that the Court order defendant to arbitrate a certain grievance filed by the plaintiff, which said grievance questions the right of defendant to contract out certain crane work under the provisions of the working agreement in effect between the parties.

Affiant further states that defendant is a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and is an employer in an industry affecting commerce as defined in the Labor Management Relations Act of 1947, as amended; that said defendant maintains and operates a manufacturing plant in the Cities of Hammond, Whiting, and East Chicago, Indiana, for the manufacture of products from petroleum, which manufacturing plant is commonly known as the "Whiting Refinery"; that affiant has been employed at said Whiting Refinery for approximately forty years and has been the Plant Manager of said refinery since

October of 1952; that defendant employs approximately three thousand persons at said refinery and affiant has [fol. 30] participated in and had supervision over all negotiations, grievances and other labor-management problems arising between plaintiff and defendant since 1952.

Affiant believes that there is no genuine issue on any material fact regarding the contracting out of crane work referred to in the complaint as between the plaintiff and defendant, American Oil Company, and that defendant, American Oil Company, is entitled to judgment as a matter of law.

Affiant further states that the plaintiff is a not-for-profit corporation, organized under the laws of the State of Indiana, and is a labor organization representing employees in an industry affecting commerce as defined in the Labor Management Relations Act of 1947, as amended, and that plaintiff is the bargaining representative for the 3,000 unit employees employed at the Whiting Refinery of defendant.

That on or about August 27, 1959, the plaintiff and defendant entered into a collective bargaining agreement, a copy of which is attached to the original complaint filed by plaintiff, made a part thereof, and marked "Exhibit A," covering the employees of the defendant as described therein for the term from August 14, 1959 to August 14, 1960; that on August 10, 1960, the plaintiff and defendant entered into an agreement to extend the collective bargaining contract executed on August 27, 1959 indefinitely, subject to cancellation by either party upon the giving to the other of seventy-two hours' notice, and said extension continued to December 22, 1960.

That for many years, the defendant has caused the crane-operating work at its Whiting Refinery to be performed by its own employees and by independent contractors; that whenever defendant used independent contractors to perform crane operating work or other types of work in and about the Whiting Refinery, one or more of the following [fol. 31] factors were in existence and were considered by defendant in arriving at its decision to use independent contractors:

(a) Whether the defendant had employees qualified to perform the work to be done;

(b) Whether the defendant had employees qualified to perform the work to be done, but such employees were not available to perform such work by virtue of their assignments to other duties;

(c) Whether the performance of the work by defendant's own employees would require the employment of additional employees and a layoff of such additional employees after completion of the work, thus creating undesirable fluctuations in defendant's work force;

(d) Whether the work involved secret patented or unique processes or secret patented or unique materials which the defendant could not reasonably have its own employees perform or handle;

(e) Whether the defendant had the equipment available to perform the work, such equipment being reasonably necessary to the performance of such work;

(f) Whether the defendant was able to secure from the independent contractor a guarantee as to the quality of the work to be done;

(g) Whether estimates revealed that the work could be performed more economically by an independent contractor than by defendant's own employees;

(h) Whether the results of the performance of similar work by defendant's own employees was satisfactory or otherwise;

(i) Whether previous experience showed that defendant's own employees did not desire to do the work because of the disagreeable nature of the work or because of the hazards involved.

[fol. 32] That the defendant, where practicable, has endeavored to cause crane-operating work to be performed by its

own employees, rather than by independent contractors; but defendant has for many years contracted with various independent contractors for the performance of crane-operating work which was performed at defendant's Whiting Refinery by said independent contractors; that attached hereto and marked "Exhibit A" is a list of the crane-operating work performed by independent contractors at the Whiting Refinery of defendant during the years 1957 to 1960, both inclusive; that in addition thereto, the defendant has for many years contracted with various independent contractors for the performance of other work at its Whiting Refinery, including pipe fabrication, electrical repairs, pipe cleaning, brass foundry work, tool making, and others, which work was performed by said independent contractors.

That prior to the year 1952, several collective bargaining agreements between the parties required the compulsory submission to arbitration of substantially any dispute or disagreement between the parties; that the subject of incorporating some limitation or restriction on the scope of matters subject to arbitration was first discussed between the parties in the summer of 1952; that on or about July 30, 1952, plaintiff union issued its Bulletin No. 2, a copy of which is attached as "Exhibit B"; that shortly thereafter, the parties held discussions and negotiations on the subject of arbitration limitation, which negotiations culminated in the language which now constitutes Section 10 of Article 2 of Exhibit "A" to plaintiff's original complaint, and was incorperated into the collective bargaining agreement on August 30, 1952.

That from time to time since December, 1955, the plaintiff union has proposed the inclusion in the collective bargaining agreement, and the parties have discussed dur- [fol. 33] ing negotiations, a specific proposal restricting the right of the defendant to contract with independent contractors for the performance of work at its Whiting Refinery; that such proposals have been rejected by the defendant.

During the negotiations between the plaintiff union and the defendant in the month of December, 1955, with relation to the modification and revision of the collective bar-

gaining agreement, the union proposed a "contracting out of work" clause, which clause would have prevented defendant from contracting any work with independent contractors, provided the defendant had the equipment and qualified employees necessary to perform the work. This proposal was rejected by the defendant.

During negotiations between the plaintiff union and defendant with respect to modification and revision of the collective bargaining agreement, in the year 1957, the union proposed the following addition to the collective bargaining agreement:

> "That all employees having a craft date be up in their respective craft before the company could contract out work which could be performed by that craft."

This proposal, which was rejected by the defendant, was intended to preclude the use by the defendant of independent contractors for work involving any craft while defendant's own employees with seniority in such craft were performing lower-rated labor work, unless defendant's own employees with seniority in the particular craft were returned to their craft jobs and rates while the employees of the independent contractors were performing any work involving the same craft in defendant's plant.

During negotiations between the plaintiff union and the defendant, in the month of February, 1959, with respect to the terms and provisions of a new collective bargaining agreement to succeed the agreement effective March 8, [fol. 34] 1957, the plaintiff union prepared the following modification of the collective bargaining agreement:

> "That a clause be incorporated in the contract which would provide that the company would not contract out work normally performed by the production and maintenance employees at the Whiting Refinery."

That this was the first time that plaintiff had proposed this specific language for the restriction of the right of defendant to contract with independent contractors, and this proposal was rejected by the defendant.

During negotiations between the plaintiff union and the defendant, in the month of December, 1961, with respect to the terms and provisions of a new collective bargaining agreement, the union proposed an amendment to the collective bargaining agreement on the subject of contracting out work, which proposal was rejected by the defendant.

That on or about October 17, 1960, the defendant entered into a contract with Justak and Sons, an independent contractor, for the performance of certain crane-operating work involving the demolition of buildings and refinery facilities at the Whiting Refinery; that in connection therewith, the employees of Justak and Sons operated certain cranes owned by Justak and Sons, and rented to the defendant, and assisted in the demolition of buildings and refining facilities by doing the crane-operating work in connection therewith; that as a result the performance of such crane-operating work by the independent contractor, Justak and Sons, the plaintiff union filed a grievance, which grievance became and was known as Case No. Whiting 60-105, and which grievance is as follows:

> "The Board of Directors of the IPWA request that, as required by the recognition clause of the applicable agreement and established past practice, policy, cus-
> [fol. 35] tom and usage, employees of the crane department be assigned and perform all crane-operating work, as established by such past policy, practice, custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work, be compensated by the appropriate rate for all time and pay so lost."

That this grievance was denied by the defendant.

That the plaintiff, on or about February 2, 1961, requested that the said grievance be referred to arbitration, and the defendant thereupon refused to submit such grievance to arbitration on the ground that the said grievance

was not arbitrable under the terms and provisions of the collective bargaining agreement.

Affiant further states that on or about December 8, 1958, the plaintiff herein brought an action in the United States District Court for the Northern District of Indiana, Hammond Division, Civil No. 2518, against the defendant named herein; that defendant appeared to said cause of action and filed its answer to plaintiff's complaint therein; that the issue presented in the complaint filed by plaintiff on December 8, 1958, known as Civil No. 2518, was substantially equivalent to the issue presented in the instant complaint; namely, the arbitrability of a grievance filed by the plaintiff which questioned the right of defendant to contract out certain work at its refinery in Whiting, Indiana.

That thereafter plaintiff and defendant stipulated the facts in the action known as Civil No. 2518 and a trial of said cause was had upon the facts as so stipulated in the United States District Court for the Northern District of Indiana, Hammond Division, and upon the issues so joined; that after a full and complete hearing on the issues as established by the stipulation of facts, the United [fol. 36] States District Court for the Northern District of Indiana, Hammond Division, entered a judgment and decree on August 10, 1959, which said judgment was in favor of defendant and decreed that defendant was not required to arbitrate its right to contract out work at its refinery in Whiting, Indiana.

That thereafter plaintiff appealed the judgment and decree entered by the district court, in favor of defendant to the Court of Appeals and on March 2, 1960, the United States Court of Appeals for the 7th Circuit affirmed the judgment of the district court on the ground that the defendant had not agreed to arbitrate its right to contract out work at the Whiting Refinery.

A. F. Endres.

Subscribed and Sworn to before me, a notary public, this 12th day of February, 1963.

(Seal) Allen W. Teagle, Notary Public.

My commission expires: May 26, 1965.

[fol. 37]

EXHIBIT A TO AFFIDAVIT OF A. F. ENDRES

List of Crane and Operator Jobs Contracted Out by American Oil Company During the Years 1957 to 1960 Inclusive.

8- 6-57	BL	63987	Two 15T crawlers—eff. 8-7-57 990-46-9471 op. until 12-9-57
8-19-57	BL	64462	One 20T crawler TX 4026
11-25-57	BL	68964	One 20-30T mobile S.O. 990-41-9589
			One 20T truck S.O. 990-41-9591
12-12-57	BL	69766	One 20T crawler 990-41-9589
12-16-57	BL	64462	One 25T crawler S.O. 990-41-9613
1- 6-58	BL	64462	One 25T Truck TX 4028
10- 3-58	BL	83210	25T crawler R-19 J & L
			(R-24) 10-24-60 added 8-4
11-10-58	BL	85079	One 8-10T crawler Berry Lake Refr. Pump Hse. cancelled 4-17-59
			One 25T to #11 Pipe Still
8-25-59	BL	99008	15T crawler R-5 No op.
			10-30-59 cancelled oper.
9- 9-59	BL	99789	25T crawler R-14 eff. 9-17-59 *No op.*
			10- 7-59 added 8-4
			10-30-59 dropped 8-4
			11-16-59 added 4-12
			12-18-59 cancelled op.
			2- 1-60 added 8-4, 4-12
			5 & 6 P. S.
			2- 5-60 cancelled 8-4, 4-12
9-12-59	BL	2167	Used at boat docks and then to Cal. Nitro.
9-15-59	BL	2167	Pull a tube bundle at Cal. Nitro.
9-18-59	BL	288	25T crawler R-15 eff. 9-21-59 FCU 500
			12-18-59 cancel O.O.
			2- 1-60 added 8-4
			2- 5-60 cancel 8-4
9-21-59	BL	2167	Hoist machinery to top of building—Research
9-23-59	BL	2167	Scale job at Cal. Nitro
9-23-59	BL	2167	For Cal. Nitro
11-17-59	BL	3145	To place propeller on ship at docks
12-13-59	BL	5255	To set #P-11-C electric motor at Cal. Nitro
12-29-59	BL	5178	25T crawler R-16 eff. 1-4-60 8-4, 4-12 Alkymer
			2-12-60 cancelled 8-4, 4-12

12-29-59	BL	5173	Crawler with 4 yd. shovel R-1	eff. 1-4-60 8-4 41-55 4-7-60 4-12 added 2-15-60 cancelled all
12-29-59	BL	5180	50T crawler R-17 dismantling	eff. 1-4-60 with O.O. 31-40 3-7-60 added 12-8 4-1-60 cancelled both shifts op. 8-4 10-24-60

[fol. 38]

12-29-59	BL	5179	40T crawler R-20	eff. 1-4-60 31-40 3-7-60 added 12-8 3-11-60 cancelled 1-8 12-8 4-21-60 cancelled 4-12 4-29-60 cancelled 8-4 5-9-60 added 8-4 5-13-60 cancelled 8-4 10-24-60 added 8-4
1-6-60	BL	5478	45T crawler R-18	eff. 1-11-60 8-4, 4-12 41-55 4-22-60 cancel 4-12 4-29-60 cancel 8-4 5-9-60 added 8-4 5-13-60 added 8-4 5-16-60 added 8-4 cancelled crane 8-31-60
1-13-60	BL	5834	J & L Tank Field	
1-15-60	BL	5988	Install sump pump and motor at Cal.-Nitro	
2-4-60	BL	7072	50T crawler R-21	eff. 2-8-60 8-4, 4-12 31-40 3-11-60 cancel 4-12 4-1-60 cancel 2 shifts 4-18-60 added 8-4, 4-12 4-22-60 cancel 8-4, 4-12 5-9-60 added 8-4, 4-12 5-13-60 cancel 4-12 10-24-60 add 8-4
2-11-60	BL	7390	Unload drums at Indiana Tank Field	
3-9-60	BL	8728	Crawler with 4 yd. shovel R-1	eff. 3-14-60 8-4 dism. stills 4-22-60 cancelled

3-23-60	Bl.	9553	40T crawler R-22	Eff. 3-28-60 — #7 P.S. 4-1-60 cancel 8-4 10-24-60 added 8-4
4-28-60	Bl.	12744	Unload propeller from Red Crown at docks	
5-31-60	Bl.	12744	Change of propeller on Cowan at docks	
6- 1-60	Bl.	12841	Replacing propeller on Seubert at docks	
6- 8-60	Bl.	13197	Move compressor parts for sandblasting at Cal. Nitro	
6-22-60	Bl.	13873	Set pump at Cal. Nitro	
6-23-60	Bl.	14004	Move 8-ton filter cartridge at Cal. Nitro	
7- 7-60	Bl.	14473	Remove equipment for engine room of Red Crown at docks	
8- 1-60	Bl.	15379	50T crawler 8-1	0.0.2 days to instruct 121-30
8-23-60	Bl.	16708	50T crawler R-23	10-24-60 added 8-4 Eff. 9-1-60 *No op.* 7th row
10-11-60	Bl.	18814	Load motor at Cal. Nitro	
10-14-60	Bl.	18998	Unload 2 vessels at south end of Cal. Nitro	
10-19-60	Bl.	19111	Change pump end—Zone 4A	

[fol. 39]

EXHIBIT B TO AFFIDAVIT OF A. F. ENDRES

Bulletin No. 2.

To All Members—Local 100 (Inc.)—Central States Petroleum Union Released by Union Board of Directors. Refers to Management's Letter, July 10, 1952.

Under date of July 10, 1952, each employee received a letter from Management which showed the interim agreement. This bulletin will enlighten you on Facts 2 and 3 of that letter.

Mr. Ducommon states that "slight changes" would be made. We ask that you carefully digest this language:

(2) "The only questions which may be referred to arbitration shall be questions directly involving or arising from

(b) Discharges of employees who have more than sixty (60) work periods to their credit, and

(c) An interpretation of or an alleged violation of provisions of this interim agreement."

Now, study this language from the 1950 Contract.

> "Questions pertaining to applications, interpretations or alleged violations of the contract, previous agreements or previous arbitration awards, as well as questions pertaining to rates of pay, wages, hours of employment, or other conditions of employment not covered by the contract shall be eligible for handling thru the procedure as set forth in Sect. 1-9."

In other words, any and everything can be arbitrated under our old contract, with the exception of a general wage increase, which remained until January 18, 1950, when Management removed the arbitration clause referring to the general wage increase, thereby instituting the "work-stoppage" clause. This issue also would have been settled by an arbitrator prior to January 18, 1950.

[fol. 40] Now the extension-agreement, which is ambiguous (meaning an agreement capable of being understood in more senses than one), can be interpreted so that it gives Management the prerogative and inherent powers to cancel and modify any previous agreements, previous arbitration awards that are not a violation or a misinterpretation as spelled out in the contract, such as:

> Purchase of coke, smoking agreements for employees, BS rate, Fire Marshal promotions, set up, ground glass goggles, bargaining on vacation dates, limitation of work for acid maintenance, craft, furnishing of tools to mechanics, choice of Sunday groups, etc.

Further, Management can put into effect any program they so desire, except that barred by the contract. What Recourse Does The Union Have Under The July 10, 1952 Letter? None! No arbitration and no right to strike as long as that interim-agreement is in effect. Someone may say that they can arbitrate alleged violation and interpretations of the extension-agreement. That is correct, and the above are considered "slight changes" by our Management. However, many matters of interest to employees are not a part of the contract and can be voided by an unfavorable management without any recourse by the Union.

If There Are Some Who Cling To The Idea That The Soco Would Not Hurt Their Employees, Just Open Your Eyes And Look Around At The Confusion Among The Crafts Where Work Is Being Wrongfully Assigned Daily, —with the comment,— "There Is No Contract, So Do As You Are Told!—Or, Go Home!! Where there is no contract to bar, they do as they please. Would they, then, do as they please if we had a contract that did not bar?

[fol. 41]

IN THE UNITED STATES DISTRICT COURT

3090

AFFIDAVIT OF JOSEPH J. SOTAK IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO LEGAL PARAGRAPH II—Filed February 27, 1963

State of Indiana,
County of Lake, ss.:

Joseph J. Sotak, being first duly sworn on oath, deposes and says:

1. That he is an employee of the defendant company at its Whiting, Indiana, refinery, and has been such for a period in excess of twenty-four (24) years; and that his present job classification is that of an instrument mechanic, in the Instrument Department, and that he was so employed on or about the 12th day of September 1960;

2. That he is the duly elected, qualified and acting representative of the Tenth Division of the plaintiff labor organization, and is the duly elected, qualified and acting secretary-treasurer of the plaintiff labor organization, and that he has occupied the position first mentioned for a period in excess of ten (10) years;

3. That as said union representative and as said union officer he is now and was, on or about the 12th day of September 1960, familiar with the assignment of employees of the defendant to the performance of crane operating work, particularly because the employees working in and

assigned to the Crane Department are in said union division;

4. That from time to time prior to the 12th day of September 1960 crane operating work was performed at the said refinery, and had been so performed continuously for a period in excess of ten (10) years prior to said date, [fol. 42] and that, on all occasions when such work was performed, it was assigned to employees of the Crane Department, provided that such employees were qualified to perform such work;

5. That any failure of the defendant to assign such crane operating work to a qualified employee, and its employment of an independent contractor to perform such work while a qualified employee was available, would or might cause the qualified crane operator to be required to perform other work, of a different nature and at a lower rate of pay, and that the said qualified crane operator might or would be required to perform his duties under working conditions substantially different from those which would have been applicable had such independent contractor not been hired;

6. That this affidavit is made for the purpose of correctly setting forth the facts with reference to the differences in working conditions which might or could obtain, for a qualified crane operator, if crane operating work were assigned to an independent contractor;

7. That this affiant is sufficiently informed as to the matters stated herein to make this affidavit.

Joseph J. Soták.

Subscribed and sworn to before me this 26th day of February 1963.

William Belshaw, Notary Public.

(Seal)

My Commission Expires: May 13, 1965.

[fol. 43]

IN THE UNITED STATES DISTRICT COURT

3090

ORDER ON MOTIONS FOR SUMMARY JUDGMENT—March 13, 1963

The Motion of the plaintiff for Summary Judgment as to Paragraph I of the amended complaint is Granted.

Defendant's motion for Summary Judgment as to Paragraph I of the amended complaint is Denied.

Defendant's Motion for Summary Judgment as to Paragraph II of the amended complaint is Denied.

Since the questions raised by Paragraph II of the amended complaint are now moot, Paragraph II is ordered dismissed.

George N. Beamer, Judge.

Enter: March 13, 1963.

MEMORANDUM ATTACHED TO ORDER

The plaintiff brought this action to compel arbitration pursuant to Section 301 of the Labor Management Relations Act of 1947 (29 U. S. C. § 185).

In Paragraph I of its amended complaint, plaintiff alleges that defendant refused to arbitrate grievances growing out of alleged violations of the collective bargaining agreement. The alleged violations consisted of contracting out crane operating work which plaintiff contends should have been performed by employees of the crane operating department. The plaintiff asserts that contracting out work violated Article I of the collective bargaining agreement and the established practices, policies, customs and usages relative to working conditions.

Defendants admit that plaintiff filed the grievance in accordance with procedure outlined in the collective bar- [fol. 44] gaining agreement; that negotiations did not result in settlement of the dispute; and that defendant refused plaintiff's request to arbitrate on ground that the dispute did not fall within the arbitration clause of the contract.

Thereafter, both parties filed a Motion for Summary Judgment with supporting affidavits as to Paragraph I of the amended complaint. Defendant also filed a Motion for Summary Judgment addressed to Paragraph II of the amended complaint, which the plaintiff opposes.

Paragraph I of the complaint involves the alleged violation of Article I of the collective bargaining agreement. Paragraph II involves the alleged violation of established policies, practices, customs and usages relative to working conditions.

The parties agree that there is no genuine issue as to any material fact insofar as the allegations of Paragraph I of the amended complaint are concerned.

Plaintiff contends that its Motion for Summary Judgment must be sustained by virtue of the teachings of *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). Defendant contends that (1) the arbitration clause in the contract is limited and does not (1) embrace the dispute covered by plaintiff's grievance; (2) that this matter has been settled by the Court of Appeals for the Seventh Circuit in the case of *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (1960), which case inquires into the same contract between the same parties, and virtually the same set of facts as are involved in this dispute; and (3) that the claim of the plaintiff is frivolous in that the alleged acts could not possibly be in violation of Section 1 of the collective bargaining agreement which is the recognition clause of the contract.

[fol. 45] The arbitration clause of the collective bargaining agreement, Article II, Section 10, page 5, reads as follows:

A. Questions which may be referred to arbitration shall be limited to:

1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.

2. Questions directly involving or arising from applications, interpretations or alleged violations

of the terms of arbitration awards and written agreements not incorporated in this Agreement.

3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from:

(a) the modification by the Company of any of said policies, practices, customs and usages, or

(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or

(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement.

Defendant contends that the arbitration clause is limited in scope and does not involve contracting out work disputes contained in the plaintiff's grievance. In the light of the Supreme Court's decision in *United Steelworkers of America* v. *Warrior Navigation Co., supra*, 363 U. S. 574, I cannot agree with defendant's contentions. That case also involved a contracting out work dispute. The contract there had a broad arbitration clause but it also contained a provision which said that "matters which are strictly a [fol. 46] function of management shall not be subject to arbitration." Id. at 577. The Court of Appeals held that contracting out work was strictly a matter of management and therefore not subject to arbitration, *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 269 F. 2d 633 (1959). The Supreme Court reversed and in discussing the duty of the Court to order arbitration said:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

> "We do not agree with the lower courts that contracting-out grievances were necessarily excepted from the grievance procedure of this agreement. To be sure, the agreement provides that 'matters which are strictly a function of management shall not be subject to arbitration.' But it goes on to say that if 'differences' arise or if 'any local trouble of any kind' arises, the grievance procedure shall be applicable."

In the instant case, Section 10.X(1) of the arbitration clause provides that arbitration may be had as to questions directly involved in or arising out of the applications, interpretations or alleged violations of the terms of the collective bargaining agreement. Plaintiff alleges a violation of the collective bargaining agreement as a result of contracting-out work. The contract provides for arbitration of "alleged violations of the terms of this agreement." Therefore, under the language of the Supreme Court in *Warrior*, at page 585, this dispute must be submitted to arbitration. No matter how strongly the Court may feel as to the lack of merit in the plaintiff's claim, it cannot deny arbitration if the arbitration clause is applicable, for by so doing, it would be passing on the merits of plaintiff's complaint, which is prohibited. Id.

[fol. 47] The case of *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (1960), which the defendant relies on as being dispositive of this question, would be persuasive except for the fact that that case, which also involved the contracting out of work, was decided on Section 10A(3) of the arbitration clause which deals with policies, practices, customs or usages relative to working conditions. The Court held that the grievance there did not involve working conditions. Moreover, that case was decided prior to the decision of the Supreme Court in *Warrior*. In its holding, the Court of Appeals relied very heavily upon the case of *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 269 F. 2d 633 (1959), the decision of the Fifth Circuit which the Supreme Court subsequently reversed. Had *Warrior* been decided by the Supreme Court prior to *Independent Petroleum Workers* v. *Standard Oil Co.*, I think the outcome would have been different.

[fol. 48]

IN THE UNITED STATES DISTRICT COURT

3090

JUDGMENT AND DECREE—March 13, 1963

This cause coming on to be heard on the respective Motions for Summary Judgment filed by the plaintiff and defendant and the Court having heard the argument of counsel and being fully advised in the premises, the Court having rendered an order and memorandum of decision, it is therefore

Ordered Adjudged and Decreed that there is no genuine issue as to any material fact herein and the prayer of the plaintiff's complaint is hereby granted; the defendant, American Oil Company, a Maryland corporation, is hereby ordered to join with the plaintiff in the submission of the grievance described in the complaint to arbitration in accordance with the provisions of the collective bargaining agreement between the parties attached to the complaint as Exhibit A, and judgment decree for costs is hereby rendered against the defendant.

George N. Beamer, Judge.

Enter: March 13, 1963.

[fol. 49]

IN THE UNITED STATES DISTRICT COURT

No. 3090—Civil

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,

vs.

AMERICAN OIL COMPANY.

NOTICE OF APPEAL—Filed April 9, 1963

Notice Is Hereby Given that American Oil Company, defendant above named, hereby appeals to the United

States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on March 13, 1963.

Dated at Hammond, Indiana, this 9th day of April, 1963.

Richard P. Tinkham, One of the Attorneys for the Defendant, American Oil Company, 708 Calumet Building, Hammond, Indiana.

To the Clerk:

Please serve this Notice on William Belshaw, Esq., 1450—119th Street, Whiting, Indiana, One of the Attorneys for the Plaintiff.

[fol. 50]

IN THE UNITED STATES COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT

No. 14183

September Term and Session, 1963

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC., Plaintiff-Appellee,

-v.-

AMERICAN OIL COMPANY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Before Knoch, Castel and Major, Circuit Judges.

OPINION—November 21, 1963

MAJOR, Circuit Judge. Plaintiff, Independent Petroleum Workers of America, Inc. (Union), brought this action under and by virtue of Section 301 of the Labor-Management Relations Act of 1947 (29 U. S. C. A. Sec. 185), to require defendant, American Oil Company (Amer[illegible]), to submit to arbitration a grievance that American had breached the collective bargaining agreement in effect between the parties

by contracting out crane work to an independent contractor. Both sides move for summary judgment. American's motion was denied and the Union's granted. On March 13, 1963, the Court entered judgment against American and ordered it "to join with the plaintiff in the submission of the grievance described in the complaint to arbitration in accordance with the provisions of the collective bargaining agreement between the parties." From this judgment American appeals.

The collective bargaining agreement insofar as here material consists of Article I, Recognition, and Article II, Grievance Procedure. The former is the common clause by which "the Company recognizes the Union as the sole and [fol. 51] exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company * * *." The latter provides a step-by-step procedure for the resolution of grievances. This procedure culminates in compulsory arbitration in certain areas (as stated in plaintiff's brief) and is contained in Section 9 of Article II.

Subsection A, Section 10, Paragraph 1 of the same Article provides:

> "As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:
>
> A. Questions which may be referred to arbitration shall be limited to:
>
> 1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement."

This Paragraph is of a two-fold nature and plaintiff emphasizes in its brief that the instant case is predicated upon and involves only "alleged violations of the terms of this agreement." It states, "The parties agreed to refer to arbitration 'questions * * * arising from * * * alleged violations of the terms of this agreement.' It is under this

clause, and solely under this clause, that Legal Paragraph I of the plaintiff's amended complaint was brought."[1]

Subsection A, Section 10, Paragraph 3 provides for arbitration of "Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from [describing situations in which the Paragraph is to be given application.]". We mention Paragraph 3 at this point only because plaintiff heretofore sought under it to compel arbitration of the same grievance. *Independent Petroleum Workers of America, Inc.* v. *Standard Oil Co.*, 275 F. 2d 706.

Subsection D, Section 10, imposes a further limitation on arbitration:

> "The Company will bargain with the Union with respect to matters relating to rates of pay, hours of [fol. 52] employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate."

Plaintiff on brief states the contested issue:

> "Is the defendant required to submit to arbitration the violation of the collective bargaining agreement alleged by plaintiff?"

Defendant on brief states this issue in different phraseology but in substance the same:

> "Whether the defendant did or did not breach its agreement with the plaintiff union when it refused to submit its right to contract out work to arbitration?"

[1] The complaint contained two Legal Paragraphs but plaintiff in the District Court, as well as here, relies only upon Legal Paragraph I. It was upon this Paragraph that the District Court granted the relief sought.

Defendant states a second contested issue:

> "Does the prior adjudication of this Court of the same issue between the same parties require the denial of plaintiff's Motion for Summary Judgment and the granting of defendant's Motion for Summary Judgment?"

Much is stated in the briefs of both parties, particularly that of plaintiff, concerning three Supreme Court cases, all decided June 20, 1960, sometimes referred to as the "Steelworkers Trilogy." *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593. We have read these cases many times and doubt if an attempt at detailed analysis would be of any benefit. The Court in *American*, as well as in *Warrior*, had before it an arbitration clause "as to the meaning, interpretation and application of the provisions of this agreement." Plaintiff here, as noted, expressly disclaims reliance upon such a basis but predicates its grievance upon a question directly involving an "alleged violation of the terms of this agreement." In any event, the so-called trilogy cases have not changed the long-established principle of law that compulsory arbitra- [fol. 53] tion cannot be properly awarded absent a contract between the parties agreeing thereto. Plaintiff appears to so recognize. Referring to the trilogy cases, in its brief it states that they "have now likewise left little doubt as to the duty of a court in its approach to the problem of arbitration in an industrial dispute situation."

Regardless of the approach, the question for decision remains as to whether the parties have obligated themselves by contract to submit the grievance in dispute to arbitration. Plaintiff recognizes this by its statement of the contested issue, as well as at other places in its brief. At one point it states, "There is only the issue of the agreement—or, non-agreement—of the parties to arbitrate." At another point it asks, "Did the parties agree to resolve by arbitration the violation of the agreement alleged by one of the parties?"

As noted, plaintiff's claim for relief is based entirely upon the "alleged violations of the terms of this agreement." The question immediately arises—what terms? We find no answer in plaintiff's brief. However, in its complaint it alleged that defendant "violated said agreement in that it failed to treat the plaintiff as the sole and exclusive collective bargaining agent as required thereby." This alleged violation refers to the recognition clause which provides, "The Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment." Certainly both defendant and plaintiff, having entered into the contract, were obligated to bargain in good faith, an obligation imposed by the National Labor Relations Act, 29 U. S. C. A. Sec. 158.

The recognition clause makes no reference either to arbitration or to the contracting out of work. More than that, the complaint, referring to Article II, alleged, "The plaintiff advanced the said grievance in accordance with the procedure established by said agreement, including the making of a request to defendant for submission of the alleged violation to arbitration," and that the defendant refused to submit the said grievance to arbitration. The grievance procedure specifically provides for bargaining between the parties concerning any grievance in dispute. Section 9 of such procedure commences, "If the question [fol. 54] is not settled as a result of negotiations[2] between the manager, or those designated by him, and the Union * * *." Then follow the provisions pertaining to arbitration which only when complied with make the question "eligible for referral to arbitration for settlement." Thus, the grievance procedure, including those provisions for bargaining on the question in dispute, must be followed step by step as a prerequisite to the right of either party to require arbitration. Plaintiff's allegation that the grievance procedure was followed is a clear admission that the parties had bargained without success concerning the issue in dispute.

---

[2] The words "negotiations" and "bargaining" are used interchangeably in outlining the grievance procedure.

Plaintiff in its brief states, "This provision [referring to Section 10, Subsection A, Paragraph 1] of the grievance procedure simply states that a grievance matter which comes into existence because of the allegation of either party that the agreement has been violated is such a question as the parties have contractually bound themselves to arbitrate." In other words, it is plaintiff's position that the mere allegation that the agreement has been violated, ipso facto, entitles it to arbitration. This position, if accepted, means that either party by alleging a refusal of the other to bargain with respect to any conceivable issue or controversy would become subject to arbitration.

Plaintiff's position is devoid of all logic. It is without merit and we so hold. Particularly is this so under the facts of the case where the complaint clearly demonstrates that the parties did bargain on the grievance in dispute.

There are other facets of the case which fortify the conclusion just stated. Subsection D of Section 10 (heretofore quoted) is a further limitation upon the arbitration provision of Section 9. Subsection D provides that the Company will bargain with the Union regarding matters not covered in the collective bargaining agreement but either party may refuse to arbitrate any such matter. Defendant contends the provision excludes from arbitration the contracting out of work because it is not covered in the agreement. Plaintiff makes no response to this contention. While we think there is plausibility in defendant's contention, we need not resolve it. The section is significant because the parties agreed that certain disputes were not subject to compulsory arbitration, which destroys [fol. 55] plaintiff's theory that the mere allegation of contract violation requires arbitration.

The bargaining history between plaintiff and defendant relative to the right of the latter to contract out work is much discussed in the briefs. Plaintiff urges that such history is irrelevant. We think, however, it has some significance and may properly be considered. *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (concurring opinion, page 569). *Pacific Northwest Bell Telephone Co.* v. *Communications Workers of America*, 310 F. 2d 244, 247. This bargaining history is set forth

in our previous decision. 275 F. 2d 706, 708. In brief, it shows that plaintiff for many years had sought the inclusion of a clause in the collective bargaining agreement specifically prohibiting or limiting the right of the defendant to contract out work. On each occasion the proposal was rejected. This bargaining history, while of course not controlling fortifies the conclusion which we have reached that plaintiff's claim is without merit.

This brings us to the issue as to whether plaintiff is barred from pursuing the instant action by reason of the prior decision of this Court. 275 F. 2d 706. Defendant contends that it is, under both the doctrines of stare decisis and collateral estoppel. Plaintiff devotes most of its argument to the former and asserts, "If the defendant fails with stare decisis, it fails equally with 'prior adjudication.'" We think this is an erroneous statement but find it unnecessary to distinguish the two doctrines because we reach the conclusion that plaintiff is barred by collateral estoppel.

Plaintiff's sole argument in opposing the application of this doctrine is that "the cause of action is different," which presents the nub of the matter. In considering this issue, we have carefully examined the briefs, pleadings and opinion of this Court filed in the former case, as well as the briefs and pleadings before us in the instant case. The two cases involve the same parties, with the same attorneys. The collective bargaining agreement in each case, including the provision for arbitration with the limitations thereon, is the same. The contested issue in both cases, as stated in plaintiff's briefs, was whether the de- [fol. 56] fendant agreed to arbitrate its right to contract out work. Plaintiff's prayer for relief in the former case was:

> "Wherefore, the plaintiff prays for judgment, and for an order enforcing the subject collective bargaining agreement as to arbitration, and for an order of this court requiring the defendant to join in the sub-

---

The contract in suit was entered into with Standard Oil Company, the named defendant in the prior suit; American, the named defendant in the instant suit, is the successor to Standard.

> mission of the involved issues to arbitration, as required by said subject agreement * * *."

Its prayer for relief in the instant case is exactly the same. It is true, as plaintiff points out and as the opinion of this Court discloses, plaintiff in the former case relied upon Paragraph 3, Subsection A, Section 10, in support of its contention that defendant was required by the terms of the agreement to arbitrate the question in dispute, while in the instant case it relies upon Paragraph 1 of the same section and subsection. The point is, however, that plaintiff might have relied upon Paragraph 1 in the previous suit but failed to do so. Its failure in this respect was not explained in its brief; neither was it explained by plaintiff's counsel during oral argument when given an opportunity to do so.

We think the conclusion inescapable that plaintiff in both cases has presented the same claim or demand, that is, that defendant be required to arbitrate the dispute in question. The only difference is that in the present case it offers in support of its claim a different reason from that relied upon in the previous case.

The cases which have dealt with the issue generally refer to and cite *Cromwell* v. *County of Sac*, 94 U. S. 351. In that case the Court discusses the difference between the effect of a judgment as a bar or estoppel to the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different cause of action. The Court stated (page 352):

> "In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might have been offered for that purpose.*" (Italics supplied.)

[fol. 57] In *Grubb* v. *Public Utilities Commission of Ohio et al.*, 281 U. S. 470, 478, the Court stated:

> "The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that."

In *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 597, the Court stated:

> "The rule provides that, when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac*, 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment."

There are many other cases to the same effect. See *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 623; *United States* v. *International Building Co.*, 345 U. S. 502, 504; *Lynch* v. *Commissioner of Internal Revenue*, 216 F. 2d 574, 579, and *First National Bank in Wichita* v. *Luther*, 217 F. 2d 262, 265. Sometimes the doctrine is referred to as res judicata, as it was in *Luther*, wherein the Court stated:

> "It is the general rule that where a second suit between the same parties, or their privies, is on the same cause of action, the final judgment in the prior action is conclusive as to all matters which were actually litigated, and as to every issue, claim, or defense which might have been presented * * *."

Plaintiff, so far as we are aware, did not petition the Supreme Court for certiorari in the case previously before this Court. In this connection, a statement in *Brownell v. Chase National Bank*, 352 U. S. 36, appears pertinent. The Court stated (page 39):

> [fol. 58] "Under familiar principles of res judicata, the claim so tendered may not be relitigated. *Cromwell v. County of Sac*, 94 U. S. 351, 352; *Tait v. Western Maryland R. Co.*, 289 U. S. 620, 623. If he was not content with the first ruling, his remedy was by certiorari to this Court. *Angel v. Bullington*, 330 U. S. 183, 189. Having failed to seek and obtain that review, he is barred from relitigating the issues tendered in the first suit."

Absent the application of the doctrine of collateral estoppel, we have before us a situation in which plaintiff relied yesterday upon one provision of the collective bargaining agreement in support of its claim or demand that defendant be required to submit to compulsory arbitration; today it relies upon a different provision of the same agreement in support of the same claim or demand, and tomorrow it will be at liberty to rely upon still another provision of the same agreement in support of the same claim or demand. It is our judgment that the doctrine should be applied and given effect.

Thus, we hold (1) that defendant was not obligated by the terms of the agreement to submit the grievance in dispute to arbitration; and (2) even if defendant were so obligated that plaintiff is barred from the maintenance of its present action.

The judgment is reversed and the cause remanded, with directions that plaintiff's motion for summary judgment be denied and defendant's motion allowed.

[fol. 59]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before: HON. WIN G. KNOCH, Circuit Judge, HON. LATHAM CASTLE, Circuit Judge, HON. J. EARL MAJOR, Circuit Judge.

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC., Plaintiff-Appellee,

No. 14183 vs.

AMERICAN OIL COMPANY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

JUDGMENT—November 21, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and it is hereby Remanded to the said District Court with directions that plaintiff's motion for summary judgment be denied and defendant's motion allowed, in accordance with the opinion of this Court filed this day.

[fol. 60]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before: HON. WIN G. KNOCH, Circuit Judge, HON. LATHAM CASTLE, Circuit Judge, HON. J. EARL MAJOR, Circuit Judge.

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Plaintiff-Appellee,

No. 14183 vs.

AMERICAN OIL COMPANY, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

ORDER DENYING PETITION FOR REHEARING—
January 6, 1964

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

[fol. 61] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 62]

SUPREME COURT OF THE UNITED STATES
No. 971—October Term, 1963

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Petitioner,

vs.

AMERICAN OIL COMPANY.

ORDER ALLOWING CERTIORARI—May 18, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

No. [redacted] 55

Office Supreme Court, U.S.
FILED
APR 3 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Petitioner,

v

AMERICAN OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM BELSHAW
BENEDICT R. DANKO
1450 119th Street
Whiting, Indiana 46394

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Petitioner,

v.

AMERICAN OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on November 21, 1963.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of Indiana is set forth on pages 43-47 of the Joint Appendix in the court below (nine copies of which have been filed with this Court) and is reported at 215 F. Supp. 1. The opinion of the Court of Appeals is reported at 324 F. 2d 903 and is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1963. Petitioner filed a timely petition for re-

hearing which was denied by the Court on January 6, 1964. This Court has jurisdiction to review the judgment herein by a writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Under a collective bargaining agreement providing for arbitration of "alleged violations of the terms of this agreement" and of "questions of . . . alleged noncompliance with past practices, customs or usages relative to working conditions," a union seeks arbitration of a claim that management violated the "recognition" clause of the agreement and departed from past practice in contracting out certain work.

1. Should the court order arbitration of the grievance, notwithstanding its belief that neither the "recognition" clause nor past practice limited the right of management to contract out work?

2. Is the doctrine of "collateral estoppel" a proper basis for denying arbitration of such a grievance, where in a prior action, involving another contracting-out grievance arising under an identical arbitration clause in an earlier agreement, the court had denied arbitration on grounds which have subsequently been repudiated by decisions of this Court?

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This is an action, like *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), brought under Section 301 of the Labor-Management Relations Act, to compel arbitration of a grievance complaining that an employer violated a collective bargaining agreement by contracting out certain work.

The union which brought the suit is the Independent Petroleum Workers of America, Inc., a labor organization which has for many years represented approximately 3,000 workers at a refinery in Whiting, Indiana. It will be referred to hereinafter as "the Union." The employer is the American Oil Company. It is the successor to the Standard Oil Company of Indiana (J.A. 27). No distinction is drawn in the pleadings between American and Standard and they will be referred to herein interchangeably as "the Company."

The Prior Litigation

In October, 1957, the Union protested the action of the Company in contracting out certain maintenance and repair work: the erection and tearing down of a scaffold and the performance of cement and stucco finishing in connection with the repair of a garage.[1] The Union filed a grievance claiming that this action violated the recognition clause[2] of

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[1] The facts here described are set forth in the opinion of the Court of Appeals in *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (7th Cir. 1960), which is reprinted in Appendix C to this petition.

[2] The recognition clause is found in Article I of the Agreement (J.A. 9) and provides in pertinent part as follows:

> "The Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company under the supervisory jurisdiction of the Manufacturing and Research Departments at its Whiting, Indiana, plant; except confidential employees, all employees represented by Research and Engineering Professional Employees As-

the agreement and was not in compliance with past policies, practices and customs. When no settlement was reached, the Union requested that the matter be arbitrated.

The agreement then, as now, contained in Section 9 of Article II an unlimited grievance procedure permitting any "questions" at all to be made the subject of a grievance. The final step in the procedure was arbitration which, however, was subject to the following limitation:

> "Section 10. As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration shall be limited to:
>
> 1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.
>
> * * * *
>
> 3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, . . .
>
> * * * *
>
> "D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement, shall be suspended but solely with respect to the

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sociation and by Office Employees Association, and all guards, professional employees and supervisors as defined by the National Labor Relations Act, as amended."

issue concerning which either party shall have so refused to arbitrate."

The Company took the position that the grievance was not arbitrable, and the Union filed suit under Section 301. In the suit, the Union relied solely on subparagraph (3) of Section 10 A, making arbitrable all questions of "alleged noncompliance with past policies, practices . . . relative to working conditions."

The District Court refused to order arbitration. *Independent Petroleum Workers* v. *Standard Oil Co.*, 44 LRRM 2676 (N.D. Ind. 1959). On March 2, 1960, the Court of Appeals for the Seventh Circuit affirmed. *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (reprinted in Appendix C, *infra*).

In reaching its conclusion, the Seventh Circuit relied heavily on the decision of the Fifth Circuit in *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 269 F. 2d 633 and, like the Fifth Circuit, decided essentially that the grievance was not arbitrable because both the negotiating history and the past practice of the parties on the substantive issue of contracting out made it clear that the grievance was without merit.[3] The critical section of the opinion reads as follows:

"[2] In our opinion the language of Section 10 A. (3) of the agreement relating to past policies, practices, customs or usages 'relative to working conditions' was not intended to and does not include within its scope the subject of contracting out maintenance and repair work on plant or equipment to independent contractors.

[3] The Seventh Circuit has since characterized its holding in this case in the following language: "Until June 20, 1960, when *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, was decided . . . most federal courts, including this Court (*Independent Petroleum Workers of America* v. *Standard Oil Co.*, 275 F. 2d 706) held that management had a right to contract out work . . ." *International Union, UAW, Local 391* v. *Webster Electric Co.*, 299 F. 2d 195, 196-197 (1962).

United Steelworkers of America, AFL-CIO v. Warrior & Gulf Navigation Company, 5 Cir., 269 F. 2d 633. This is especially so in view of the history of the negotiations of the parties concerning the performance of work by independent contractors. The continued bargaining on the subject evidences their intent and understanding.

"In addition, the stipulated facts concerning the past practice of defendant in letting out maintenance and repair work to independent contractors serve to demonstrate that the subject had always been treated as a matter of managerial prerogative." 275 F. 2d at 709.

One hundred ten days later — on June 20, 1960 — this Court reversed the *Warrior & Gulf* case upon which the Seventh Circuit had relied. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574.

Meanwhile, on August 27, 1959—before the Court of Appeals rendered its decision—a new collective bargaining agreement was made (J.A. 30). This agreement contained the same arbitration language and the same recognition clause as the old agreement. During its term a new dispute about the contracting out of work arose.

The Present Litigation

In October, 1960, the Company contracted out certain crane-operating work (J.A. 34). The Union claimed that this violated the recognition clause of the 1959 agreement and also violated a practice of more than ten years standing that all crane-operating work at the refinery was assigned to employees of the Crane Department if such employees were qualified to perform the particular work (J.A. 34, 41).

A grievance was filed and processed but no satisfactory settlement was reached. The Union then sought arbitration (J.A. 35). When the Company refused, on the ground that

the dispute was not arbitrable, the present suit was instituted (J.A. 23).

The complaint was in two parts. The Union claimed first that the dispute was arbitrable under subparagraph (1) of Section 10 A because the grievance alleged that the Company's action violated the recognition clause of the agreement (J.A. 4-6). Secondly, the complaint claimed that the dispute was arbitrable under subparagraph (3) of Section 10 A because the grievance alleged that the Company's action violated an established policy, practice and custom of assigning all crane-operating work to employees of its crane department, provided that such employees were qualified to perform such work (J.A. 7).

The Company, in its answer, denied the existence of a past practice and denied that the claim of violation of the agreement was arbitrable (J.A. 24-26). As an additional defense, the Company alleged that the issue presented in the complaint was identical to the issue which had been presented in the prior litigation, and that therefore any relief on the present complaint was barred (J.A. 26-28).

Both parties moved for summary judgment. The Union's motion relied exclusively on its first claim, based upon the allegation of violation of the agreement (J.A. 20). The Company's motion asked for summary judgment on both claims (J.A. 28).

The District Court granted the Union's motion, denied the Company's motion, and directed the Company to proceed to arbitration of the grievance (J.A. 48). The Court, in a memorandum opinion, said:

> "Plaintiff alleges a violation of the collective bargaining agreement as a result of contracting-out work. The contract provides for arbitration of 'alleged violations of this agreement.' Therefore, under the language of the Supreme Court in *Warrior*, at page 585, this dispute must be submitted to arbitration" (J.A. 46).

The earlier decision by the Court of Appeals, the District Court held, was inapplicable because it had been decided solely on the basis of Section 10 A (3), dealing with arbitration of questions involving past practices. Furthermore, that decision was made prior to the Supreme Court's *Warrior* opinion and relied heavily on the decision of the Fifth Circuit in the *Warrior* case which was subsequently reversed (J.A. 47).

On appeal, the Court of Appeals reversed the decision of the District Court, and remanded the case with directions that the Union's motion for summary judgment be denied, and the Company's motion on both claims be granted. (Appendix C, *infra.*)

Although the Court's order disposes of both of the Union's claims, its opinion discusses only the ~~claim~~ that the grievance was arbitrable under subparagraph 1 of the arbitration provision, which provides for arbitration of alleged violations of the agreement. The grievance was not arbitrable under that provision, the court said, because there is no clause in the agreement dealing with contracting out. Pointing out that the Union relied on the recognition clause as the basis for its grievance, the court held that that clause was inapplicable because it made no reference either to arbitration or to the contracting out of work. The court stated that that clause only required the Company to bargain with the Union on wages, hours and working conditions. Since the Company had bargained on this very grievance, the court concluded that it had fulfilled its obligations under the recognition clause (App. A., pp. 27-28).

To the Union's argument that this question was for the arbitrator since the Union had alleged that there was a violation of the agreement, and the arbitration clause made arbitrable any questions "involving or arising from applications, interpretations or alleged violations of the terms of this agreement," the court responded that "plaintiff's position is devoid of all logic. It is without merit and we so hold" (App. A, p. 28).

The court went on to refer to the bargaining history on the subject of contracting out and concluded that this history fortified its conclusion that the plaintiff's claim was without merit (App. A, p. 29).

The court then turned to the question raised by the Company's reliance on the prior decision of the Circuit Court. It concluded that, although in the first case the Union had relied on the past practice clause while in this case it was relying upon the contract violation clause, the dispute was essentially the same. Ignoring the fact that this was a new and separate grievance arising out of a new fact situation under a new collective agreement, the court said that "the plaintiff in both cases has presented the same claim or demand . . . The only difference is that in the present case it offers in support of its claim a different reason . . ." The Union, therefore, was barred by the doctrine of collateral estoppel (App. A, pp. 29-30). The Court summed up its holding in the following words:

> "Thus, we hold (1) that defendant was not obligated by the terms of the agreement to submit the grievance in dispute to arbitration, and (2) even if defendant were so obligated that plaintiff is barred from the maintenance of its present action" (App. A, p. 33).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below that the grievance in this case is not subject to arbitration under the parties' collective bargaining agreement is squarely in conflict with the decisions of this Court in *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960), and *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). In both of those cases, this Court held that when a collective bargaining agreement provides for arbitration of questions as to the meaning, interpretation, or application of the agreement, an employer is obligated to arbitrate any claim by the union

that the agreement has been violated. The Court emphasized that the merits of the union's grievance should have absolutely no bearing on the question of whether that grievance is subject to arbitration:

> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, *or determining whether there is particular language in the written instrument which will support the claim.* The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." 363 U.S. at 568 (emphasis added).

In the present case, the agreement provides that "questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement" are subject to arbitration. It also provides for arbitration of "questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions." (J.A. 12-13). The Union claimed that the Company's assignment of crane-operating work to outside contractors in the circumstances of this case violated the recognition clause of the agreement, and also departed from past practice. (J.A. 34). Plainly, under the principles established in *American Manufacturing* and *Warrior & Gulf* the Union's claims are arbitrable.

The court below held that the alleged violation of the recognition clause was not subject to arbitration because "the recognition clause makes no reference either to arbitration or to the contracting out of work." In other words, the court itself decided the question which the Union wished to submit to arbitration—whether the recognition clause does impose some limitation on the Company's right to assign work to independent contractors. The court's entire opinion is based on the premise that the Company's sole obligation under the recognition clause is to bargain with the Union—a

premise which begs the very question which the Union wished to arbitrate.

While the merits of the union's grievance have no bearing on the issue before the Court ("the processing of even frivolous claims may have therapeutic values" 363 U. S. at 568), it is noteworthy that there is considerable authority for the Union's interpretation of the recognition clause. A substantial body of arbitration opinion holds that a recognition clause such as is involved in this case (and in virtually every collective bargaining agreement) does imply some limitation on the right of management to contract out the work of the unit for which the employer has agreed to recognize the union as bargaining representative. The reasoning normally relied upon by arbitrators is exemplified by a decision of Sylvester Garrett, past president of the National Academy of Arbitrators and Chairman of the Board of Arbitration under the agreement between the United Steelworkers of America and United States Steel Corporation:

> "In view of the fact that the union has status as exclusive representative of all incumbents of a given group of jobs, it would appear that recognition of the Union plainly obliges the Company to refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit." *National Tube Co.*, 17 Lab. Arb. 790, 793-94 (1951).[4]

The court characterized as "devoid of all logic" the argument that "the mere allegation that the agreement has been violated, *ipso facto*, entitles [the Union] to arbitration." This proposition, dismissed so cavalierly by the court below, is of

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[4] See also *Celanese Corp. of America*, 33 Lab. Arb. 925, 942-43 (1959) (table of contracting-out cases showing 16 instances in which arbitrators relied on the recognition clause); Crawford, *The Arbitration of Disputes over Subcontracting* (published by the Bureau of National Affairs in Challenges to Arbitration: Proceedings of the Thirteenth Annual Meeting, National Academy of Arbitrators) pp. 51, 67.

course precisely what this Court held in *American Manufacturing:*

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances, the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> * * * * *
>
> "The Union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to 'the meaning, interpretation and application' of the collective bargaining agreement. Arbitration should have been ordered. When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." 363 U.S. at 567-69.

Perhaps most directly in point is the Court's decision in *Warrior & Gulf,* which involved a grievance, like the one in the present case, claiming that the employer had violated the agreement by contracting out certain work. The employer in that case, as in the present case, argued that no provision of the agreement restricted management's right to assign work to contractors. And in that case, as in the present one, the Union had in the past unsuccessfully attempted to negotiate a specific contractual provision dealing with

contracting out. Both the District Court and the Court of Appeals in *Warrior & Gulf*, as well as the dissenting member of this Court, considered that fact significant—as did the court below in the present case. But the majority of this Court recognized that this type of bargaining history is relevant only to the merits of the Union's grievance, not to the question of arbitrability:

> "The grievance alleged that the contracting out was in violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration.
>
> "The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts." 363 U.S. at 585.

The reasoning of this Court in *Warrior & Gulf* and *American Manufacturing* is, of course, equally applicable to the Union's second claim in this case: that the grievance was arbitrable under the provision of the agreement requiring arbitration of "alleged noncompliance with past policies, practices, customs or usages relative to working conditions." A court's view of the merits is no more a basis for denying arbitration under a provision providing for arbitration of claimed departures from past practice than it is for denying arbitration of a claim that the terms of the agreement have been violated. In neither situation is there any reason to assume that the parties intended to submit to arbitration only grievances which a court believes have some merit. And in both situations the federal policy favoring grievance arbitration is applicable.

Respondent, in its argument below, urged that the present

case could be distinguished from *American Manufacturing* and *Warrior & Gulf* on the ground that the latter cases involved agreements with absolute no-strike clauses, while the agreement in this case permits strikes over matters "relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement . . ." This argument, which was not relied upon by the court below, is, of course, totally lacking in merit. The *American Manufacturing* and *Warrior & Gulf* decisions are not limited in their applicability to agreements containing absolute no-strike obligations. The concurring opinion of Mr. Justice Brennan makes this absolutely clear, 363 U.S. at 564. And the other courts of appeals which have passed on the question have so held. *International Union of Elec. Workers* v. *Westinghouse Elec. Corp.*, 326 F. 2d 758 (2d Cir. 1964), *affirming per curiam* 218 F. Supp. 82 (S.D.N.Y. 1963); *United Steelworkers* v. *General Elec. Co.*, 327 F. 2d 853 (6th Cir., Feb. 19, 1964), *affirming* 211 F. Supp. 562 (N.D. Ohio 1962); *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists*, 304 F. 2d 449 (1st Cir. 1962) (in which precisely the same argument was made in Appellant's Brief).[5] See also *Drake Bakeries Inc.* v. *Local 50, American*

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[5] The employer in that case argued as follows:

> "The *Warrior & Gulf* contract contained an 'absolute' no-strike clause in the contract, by which the Union bound itself not to strike over any grievances during the life of the contract . . .
>
> "Here, in sharp contrast, the contract contains an express exception to the no-strike clause, in all cases where the Company denies that a particular grievance presents an arbitrable question. Section 13 of Article XVIII. In other words, the parties here, with respect to disputes not resolved in the grievance procedure, have bargained, not for the absolute *quid pro quo* found in Warrior & Gulf (of arbitration in every instance) but for an alternative: if the particular issue, arbitrability of which has been disputed by the Company, is (by reason of its broad scope or significance or otherwise) of sufficient concern to the Union,

Bakery Workers, 370 U.S. 254, 261 n. 7.[6]

2. Since this Court decided *American Manufacturing* and *Warrior & Gulf*, the lower federal courts have, almost without exception, applied the proper test in determining the arbitrability of grievances arising under collective bargaining agreements. It is not surprising, therefore, that the present decision is in conflict with the decisions of a number of other Circuits. Thus, in *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists*, 304 F. 2d 449 (1st Cir. 1962), the court summarily ordered arbitration of a contracting-out grievance on the authority of *Warrior & Gulf*. The agreement in that case, as in the present case, contained no express provision dealing with contracting out. Moreover, the agreement there, as here, had a limited no-strike clause which permitted the union to strike on matters not subject to arbitration. The employer in that case also argued that the absence of an absolute no-strike clause required a narrower interpretation of the arbitration provision than was adopted in *Warrior & Gulf*.[7] The court rejected the argument without even deigning to mention it.

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the Union is given express freedom to use, or threaten the use of, its customary and powerful sanction, the strike. Otherwise stated, the appellant Company has deliberately accepted the risk of a strike in order to protect itself against unwarranted arbitral intrusion into areas of solely management concern. The whole concept and approach to the arbitration clause is completely and significantly different from the *Warrior & Gulf* case." Brief for Appellant, *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists*, 304 F. 2d 449 (1st Cir. 1962), pp. 15-16.

[6] The only decision of which we are aware that seems to hold that the principles of *American Mfg.* and *Warrior & Gulf* are inapplicable where there is a right to strike is *Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 217 F. Supp. 622 (W.D. Pa. 1963). That case, however, seems in conflict with a decision of the Third Circuit in a suit to compel arbitration brought on the same agreement, and involving the same parties, in which the court stated that those principles were controlling. *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 283 F. 2d 93 (3rd Cir. 1960).

[7] See note 5 *supra*.

Other decisions directing arbitration of contracting-out grievances under arbitration clauses similar to that involved here are: *International Tel. & Tel. Co.* v. *Local 400, International Union of Elec. Workers*, 286 F. 2d 329 (3rd Cir. 1960); *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg. Co.*, 298 F. 2d 644 (2d Cir. 1962). See also *Taft Broadcasting Co.* v. *Radio Broadcast Technicians*, 298 F. 2 707 (5th Cir. 1962) (ordering arbitration of grievance protesting displacement of employees by new equipment); *International Union, UAW* v. *Cardwell Mfg. Co.*, 304 F. 2d 801 (10th Cir. 1962) (ordering arbitration of grievance protesting assignment of certain work to supervisors).

Similarly, there are a number of cases in which the employer has contended that the Union's grievance constituted an attempt to obtain something which the Union had failed to obtain (or had given up) during contract negotiations. The Courts of Appeals have uniformly held that such bargaining history is relevant only to the merits of the grievance, not to the question of arbitrability. *International Union, UAW* v. *Cardwell Mfg. Co.*, 304 F. 2d 801 (10th Cir. 1962); *Harris Structural Steel Co.* v. *United Steelworkers* 298 F. 2d 363 (3rd Cir. 1962), *cert. denied*, 369 U.S. 851 (1962); *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 283 F. 2d 93 (3rd Cir. 1960).[8]

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[8] The decision in *Pacific Northwest Bell Telephone Co.* v. *Communications Workers*, 310 F. 2d 244 (9th Cir. 1962), relied upon by the court below, is not in conflict with these cases. There the union sought arbitration of a grievance protesting the disciplinary suspension of an employee. The employer offered to prove that when the arbitration clause was negotiated it was understood between the parties that disciplinary suspensions would not be subject to arbitration. The Court held that such bargaining history was relevant, since it went to the question of arbitrability, not to the merits. The Court was very careful to point out that a different result would have been reached if the employer had merely attempted to produce evidence of bargaining history on management's right to impose disciplinary suspensions. 310 F. 2d at 248-49.

The present case, in short, constitutes the first substantial departure by any court of appeals from the principles laid down in *American Manufacturing* and *Warrior & Gulf*. If the decision below is permitted to stand, it will inevitably tend to cause a renewal of the confusion and conflict which this Court sought to put to rest in those decisions. Employers in the Seventh Circuit—which includes the heavily industrialized area around Chicago—and perhaps elsewhere as well, will once again be encouraged to resist arbitration of grievances which, under the applicable decisions of this Court, are plainly arbitrable. To avoid this result, this Court should eliminate the conflict in the law which the present case has created by granting this petition for certiorari and reversing the decision below.

3. To the extent that the court below relied upon the doctrine of "collateral estoppel" in support of the result it reached, its decision is clearly erroneous and squarely in conflict with the decision of this Court in *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948).

The theory of the court below was that its earlier decision in *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (7th Cir. 1960), in which it had denied arbitration of a different contracting-out grievance under an earlier agreement containing an identical arbitration clause, collaterally estopped the union from seeking arbitration of the contracting-out issue involved in this case (or any other contracting-out grievance which might ever arise). This decision is simply wrong for three reasons:

(1) A decision on an issue of law rendered in an earlier suit for breach of contract does not operate as a collateral estoppel in a subsequent suit brought on another contract, even though the language of both contracts may be identical.

(2) The doctrine of collateral estoppel does not apply where, between the first action and the second one, inter-

vening judicial decisions have rendered the first decision obsolete.

(3) Even if the doctrine of collateral estoppel were applicable in this action, it could not bar the plaintiff's claim under subparagraph 1 of Section 10 A of the agreement (providing for arbitration of alleged violations of the agreement), since the earlier action was based solely on subparagraph 3 (providing for arbitration of alleged noncompliance with past practice).

All three of these principles are firmly established by this Court's decision in *Sunnen*. The question in that case was whether a taxpayer was liable for income tax on royalties paid by a corporation under several patent licensing agreements between the taxpayer and the corporation. The taxpayer claimed that he was not liable for taxes on these royalties because he had assigned his entire right, title and interest in the licensing agreements to his wife, and the royalties had in fact been paid to her. Moreover, the taxpayer claimed that the Commissioner was barred from asserting these tax claims because, in a prior proceeding, the Board of Tax Appeals had held that the taxpayer was not liable for income tax on the royalties paid to his wife under one of these licensing agreements.

The Court began its opinion by explaining the difference between *res judicata* and collateral estoppel. The former doctrine, the Court said, "applies to repetitious suits involving the same cause of action," and precludes relitigation of any matter which might have been raised in the original proceeding. 333 U. S. at 597. Collateral estoppel, on the other hand, applies "where the second action between the parties is upon a different cause or demand." In that situation, the Court stated:

> "the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or

> points controverted, upon the determination of which the findings or verdict was rendered'. [citations omitted] *Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time.*" 333 U. S. at 597-98 (emphasis added).

As applied to the present case, this means that—contrary to the holding of the court below—the earlier decision that a contracting-out grievance was not arbitrable under subparagraph 3 could not in any event bar a subsequent claim for arbitration of another grievance under subparagraph 1, since the latter claim, while "it might have been tendered and decided" in the first case, was "not in issue in the first proceeding."[9]

The first principle enunciated in *Sunnen* thus makes it clear that the doctrine of collateral estoppel provides no basis at all for denying the Union's claim under the recognition clause and directing summary judgment for the Company on that claim. The remainder of the *Sunnen* decision,

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[9] This principle was recognized by this Court as early as 1877 in *Cromwell* v. *County of Sac*, 94 U.S. 351, 353:

> "But where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action."

See also, *Restatement, Judgments* § 70 Comment c (1943): "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of law not litigated in the first action."

however, makes it clear that the doctrine of collateral estoppel does not provide any basis for directing summary judgment for the Company on either of the Union's claims.

After setting out the general rule of collateral estoppel, the Court in *Sunnen* went on to explain that that rule is not always applicable even to questions which have previously been litigated in prior actions between the same parties. Specifically, it is not to be applied if "a change or development in the controlling legal principles" makes the earlier determination "obsolete or erroneous, at least for future purposes . . ."

> "That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time . . ." 333 U.S. at 591.

The Court expressly stated that one type of intervening change which can make the doctrine of collateral estoppel inapplicable is "a modification or growth in legal principles as enunciated in intervening decisions of this Court . . ." 333 U.S. at 591.

Accordingly, even if the principle of collateral estoppel might otherwise be applicable in the present case, the fact that this Court's decisions in *American Manufacturing* and *Warrior & Gulf* were rendered subsequent to the earlier decision of the Court below, and totally undercut the basis on which that earlier decision was rendered, means that the parties are not bound to the obsolete principles of law relied on in the earlier case.[10] As the District Court in the present case stated, "Had *Warrior* been decided prior to *Independent Petroleum Workers* v. *Standard Oil Co.*, I think the outcome would have been different" (J.A. 47).

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[10] See also *State Farm Mutual Ins. Co.* v. *Duel*, 324 U.S. 154, 162 (1945); Restatement, Judgments § 70 Comment f. (1943).

Finally, the Court in *Sunnen* pointed out that the earlier proceeding had involved royalty payments under only one licensing agreement executed in 1928, while the pending case involved payments under several other, though essentially identical, licensing agreements as well. Even though the issues raised under all of the licensing agreements were identical, the Court held that the doctrine of collateral estoppel, if applicable at all, could apply only to the taxability of the payments made under the particular agreement involved in the earlier proceeding:

> "... if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result or, if consistency in decision is considered just and desirable reliance may be placed upon the ordinary rule of *stare decisis*. Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matters raised in the second proceeding must involve the same set of events, or documents and the same bundle of legal principles that contributed to the rendering of the first judgment ..."

It is readily apparent in this case that the royalty payments growing out of the license contracts which were not involved in the earlier action before the Board of Tax Appeals and which concerned different tax years are free from the effects of the collateral estoppel doctrine. That is true even though these contracts are identical in all important respects with the 1928 contract.

the only one that was before the Board, and even though the issue as to those contracts is the same as that raised by the 1928 contract . . ." 333 U.S. at 601-02.

Accordingly, the doctrine of collateral estoppel cannot apply in the present case at all, for the simple reason that the present action involves a different grievance, arising under a different collective bargaining agreement than was involved in the earlier decision.[11] The earlier case can therefore be relied on only as precedent, and its value as precedent is nil because of the subsequent contrary decisions of this Court.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted, and the judgment below summarily reversed on the authority of *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960); and *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948).

Respectfully submitted,

WILLIAM BELSHAW
BENEDICT R. DANKO
1450 119th Street
Whiting, Indiana 46394

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Petitioner

[11] See also, *Restatement, Judgments* § 70, Comments, b., e. (1943); Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 7 (1942).

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 14183

SEPTEMBER TERM AND SESSION, 1963

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Plaintiff-Appellee,

v.

AMERICAN OIL COMPANY,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION.

November 21, 1963

Before KNOCH, CASTLE and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* Plaintiff, Independent Petroleum Workers of America, Inc. (Union), brought this action under and by virtue of Section 301 of the Labor-Management Relations Act of 1947 (29 U. S. C. A. Sec. 185), to require defendant, American Oil Company (American), to submit to arbitration a grievance that American had breached the collective bargaining agreement in effect between the parties by contracting out crane work to an independent contractor. Both sides moved for summary judgment. American's Motion was denied and the Union's granted. On March 13, 1963, the Court entered judgment against American and ordered it "to join with the plaintiff in the submission of

the grievance described in the complaint to arbitration in accordance with the provisions of the collective bargaining agreement between the parties." From this judgment American appeals.

The collective bargaining agreement insofar as here material consists of Article I, Recognition, and Article II, Grievance Procedure. The former is the common clause by which "the Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company * * *." The latter provides a step-by-step procedure for the resolution of grievances. This procedure culminates in compulsory arbitration in certain areas (as stated in plaintiff's brief) and is contained in Section 9 of Article II.

Subsection A, Section 10, Paragraph 1 of the same Article provides:

> "As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:
>
> A. Questions which may be referred to arbitration shall be limited to:
>
> 1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement."

This Paragraph is of a two-fold nature and plaintiff emphasizes in its brief that the instant case is predicated upon and involves only "alleged violations of the terms of this agreement." It states, "The parties agreed to refer to arbitration 'questions * * * arising from * * * alleged violations of the terms of this agreement.' It is under this clause, and solely under this clause, that Legal Paragraph I of the Plaintiff's amended complaint was brought." [1]

---

[1] The complaint contained two Legal Paragraphs but plaintiff in the District Court, as well as here, relies only upon Legal Paragraph I. It was upon this Paragraph that the District Court granted the relief sought.

Subsection A, Section 10, Paragraph 3 provides for arbitration of "Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from [describing situations in which the Paragraph is to be given application.]" We mention Paragraph 3 at this point only because plaintiff heretofore sought under it to compel arbitration of the same grievance. *Independent Petroleum Workers of America, Inc.* v. *Standard Oil Co.*, 275 F. 2d 706.

Subsection D, Section 10, imposes a further limitation on arbitration:

> "The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate."

Plaintiff on brief states the contested issue:

> "Is the defendant required to submit to arbitration the violation of the collective bargaining agreement alleged by plaintiff?"

Defendant on brief states this issue in different phraseology but in substance the same:

> "Whether the defendant did or did not breach its agreement with the plaintiff union when it refused to submit its right to contract out work to arbitration?"

Defendant states a second contested issue:

"Does the prior adjudication of this Court of the same issue between the same parties require the denial of plaintiff's Motion for Summary Judgment and the granting of defendant's Motion for Summary Judgment?"

Much is stated in the briefs of both parties, particularly that of plaintiff, concerning three Supreme Court cases, all decided June 20, 1960, sometimes referred to as the "Steelworkers Trilogy." *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593. We have read these cases many times and doubt if an attempt at detailed analysis would be of any benefit. The Court in *American*, as well as in *Warrior*, had before it an arbitration clause "as to the meaning, interpretation and application of the provisions of this agreement." Plaintiff here, as noted, expressly disclaims reliance upon such a basis but predicates its grievance upon a question directly involving an "alleged violation of the terms of this agreement." In any event, the so-called trilogy cases have not changed the long-established principle of law that compulsory arbitration cannot be properly awarded absent a contract between the parties agreeing thereto. Plaintiff appears to so recognize. Referring to the trilogy cases, in its brief it states that they "have now likewise left little doubt as to the duty of a court in its approach to the problem of arbitration in an industrial dispute situation."

Regardless of the approach, the question for decision remains as to whether the parties have obligated themselves by contract to submit the grievance in dispute to arbitration. Plaintiff recognizes this by its statement of the contested issue, as well as at other places in its brief. At one point it states, "There is only the issue of the agree-

ment—or non-agreement—of the parties to arbitrate." At another point it asks, "Did the parties agree to resolve by arbitration the violation of the agreement alleged by one of the parties?"

As noted, plaintiff's claim for relief is based entirely upon the "alleged violations of the terms of this agreement." The question immediately arises—what terms? We find no answer in plaintiff's brief. However, in its complaint it alleged that defendant "violated said agreement in that it failed to treat the plaintiff as the sole and exclusive collective bargaining agent as required thereby." This alleged violation refers to the recognition clause which provides, "The Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment." Certainly both defendant and plaintiff, having entered into the contract, were obligated to bargain in good faith, an obligation imposed by the National Labor Relations Act, 29 U. S. C. A. Sec. 158.

The recognition clause makes no reference either to arbitration or to the contracting out of work. More than that, the complaint, referring to Article II, alleged, "The plaintiff advanced the said grievance in accordance with the procedure established by said agreement, including the making of a request to defendant for submission of the alleged violation to arbitration," and that the defendant refused to submit the said grievance to arbitration. The grievance procedure specifically provides for bargaining between the parties concerning any grievance in dispute. Section 9 of such procedure commences, "If the question is not settled as a result of negotiations[2] between the manager, or those designated by him, and the Union * * *." Then follow the provisions pertaining to arbitration which only when complied with make the question "eligible for re-

[2] The words "negotiations" and "bargaining" are used interchangeably in outlining the grievance procedure.

ferral to arbitration for settlement." Thus, the grievance procedure, including those provisions for bargaining on the question in dispute, must be followed step by step as a prerequisite to the right of either party to require arbitration. Plaintiff's allegation that the grievance procedure was followed is a clear admission that the parties had bargained without success concerning the issue in dispute.

Plaintiff in its brief states, "This provision [referring to Section 10, Subsection A, Paragraph 1] of the grievance procedure simply states that a grievance matter which comes into existence because of the allegation of either party that the agreement has been violated is such a question as the parties have contractually bound themselves to arbitrate." In other words, it is plaintiff's position that the mere allegation that the agreement has been violated, ipso facto, entitles it to arbitration. This position, if accepted, means that either party by alleging a refusal of the other to bargain with respect to any conceivable issue or controversy would become subject to arbitration.

Plaintiff's position is devoid of all logic. It is without merit and we so hold. Particularly is this so under the facts of the case where the complaint clearly demonstrates that the parties did bargain on the grievance in dispute.

There are other facets of the case which fortify the conclusion just stated. Subsection D of Section 10 (heretofore quoted) is a further limitation upon the arbitration provision of Section 9. Subsection D provides that the Company will bargain with the Union regarding matters not covered in the collective bargaining agreement but either party may refuse to arbitrate any such matter. Defendant contends the provision excludes from arbitration the contracting out of work because it is not covered in the agreement. Plaintiff makes no response to this contention. While we think there is plausibility in defendant's contention, we need not resolve it. The section is significant because the parties agreed that certain disputes were not sub-

ject to compulsory arbitration, which destroys plaintiff's theory that the mere allegation of contract violation requires arbitration.

The bargaining history between plaintiff and defendant relative to the right of the latter to contract out work is much discussed in the briefs. Plaintiff urges that such history is irrelevant. We think, however, it has some significance and may properly be considered. *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (concurring opinion, page 569). *Pacific Northwest Bell Telephone Co.* v. *Communications Workers of America*, 310 F. 2d 244, 247. This bargaining history is set forth in our previous decision. 275 F. 2d 706, 708. In brief, it shows that plaintiff for many years had sought the inclusion of a clause in the collective bargaining agreement specifically prohibiting or limiting the right of the defendant to contract out work. On each occasion the proposal was rejected. This bargaining history while of course not controlling fortifies the conclusion which we have reached that plaintiff's claim is without merit.

This brings us to the issue as to whether plaintiff is barred from pursuing the instant action by reason of the prior decision of this Court. 275 F. 2d 706. Defendant contends that it is, under both the doctrines of stare decisis and collateral estoppel. Plaintiff devotes most of its argument to the former and asserts, "If the defendant fails with stare decisis, it fails equally with 'prior adjudication.'" We think this is an erroneous statement but find it unnecessary to distinguish the two doctrines because we reach the conclusion that plaintiff is barred by collateral estoppel.

Plaintiff's sole argument in opposing the application of this doctrine is that "the cause of action is different," which presents the nib of the matter. In considering this issue, we have carefully examined the briefs, pleadings and opinion of this Court filed in the former case, as well as the briefs and pleadings before us in the instant case. The two cases

involve the same parties,[3] with the same attorneys. The collective bargaining agreement in each case, including the provision for arbitration with the limitations thereon, is the same. The contested issue in both cases, as stated in plaintiff's briefs, was whether the defendant agreed to arbitrate its right to contract out work. Plaintiff's prayer for relief in the former case was:

> "Wherefore, the plaintiff prays for judgment, and for an order enforcing the subject collective bargaining agreement as to arbitration, and for an order of this court requiring the defendant to join in the submission of the involved issues to arbitration, as required by said subject agreement * * *."

Its prayer for relief in the instant case is exactly the same. It is true, as plaintiff points out and as the opinion of this Court discloses, plaintiff in the former case relied upon Paragraph 3, Subsection A, Section 10, in support of its contention that defendant was required by the terms of the agreement to arbitrate the question in dispute, while in the instant case it relies upon Paragraph 1 of the same section and subsection. The point is, however, that plaintiff might have relied upon Paragraph 1 in the previous suit but failed to do so. Its failure in this respect was not explained in its brief; neither was it explained by plaintiff's counsel during oral argument when given an opportunity to do so.

We think the conclusion inescapable that plaintiff in both cases has presented the same claim or demand, that is, that defendant be required to arbitrate the dispute in question. The only difference is that in the present case it offers in support of its claim a different reason from that relied upon in the previous case.

The cases which have dealt with the issue generally refer

[3] The contract in suit was entered into with Standard Oil Company, the named defendant in the prior suit. American, the named defendant in the instant suit, is the successor to Standard.

to and cite *Cromwell* v. *County of Sac*, 94 U. S. 351. In that case the Court discusses the difference between the effect of a judgment as a bar or estoppel to the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different cause of action. The Court stated (page 352):

> "In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might have been offered for that purpose.*" (Italics supplied.)

In *Grubb* v. *Public Utilities Commission of Ohio et al.*, 281 U. S. 470, 478, the Court stated:

> "The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that."

In *Commissioner of Internal Revenue* v. *Sunnen*, 333 U. S. 591, 597, the Court stated:

> "The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other ad-

missible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac,* 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment."

There are many other cases to the same effect. See *Tait* v. *Western Maryland Ry. Co.,* 289 U. S. 620, 623; *United States* v. *International Building Co.,* 345 U. S. 502, 504; *Lynch* v. *Commissioner of Internal Revenue,* 216 F. 2d 574, 579, and *First National Bank in Wichita* v. *Luther,* 217 F. 2d 262, 265. Sometimes the doctrine is referred to as res judicata, as it was in *Luther,* wherein the Court stated:

"It is the general rule that where a second suit between the same parties, or their privies, is on the same cause of action, the final judgment in the prior action is conclusive as to all matters which were actually litigated and as to every issue, claim, or defense which might have been presented * * *."

Plaintiff, so far as we are aware, did not petition the Supreme Court for certiorari in the case previously before this Court. In this connection, a statement in *Brownell* v. *Chase National Bank,* 352 U. S. 36, appears pertinent. The Court stated (page 39):

"Under familiar principles of res judicata, the claim so tendered may not be relitigated. *Cromwell* v. *County of Sac,* 94 U. S. 351, 352; *Tait* v. *Western Maryland R. Co.,* 289 U. S. 620, 623. If he was not content with the first ruling, his remedy was by certiorari to this Court. *Angel* v. *Bullington,* 330 U. S. 183, 189. Having failed to seek and obtain that review, he is barred from relitigating the issue tendered in the first suit."

Absent the application of the doctrine of collateral estoppel, we have before us a situation in which plaintiff relied yesterday upon one provision of the collective bargaining agreement in support of its claim or demand that defendant be required to submit to compulsory arbitration; today it relies upon a different provision of the same agreement in support of the same claim or demand; and tomorrow it will be at liberty to rely upon still another provision of the same agreement in support of the same claim or demand. It is our judgment that the doctrine should be applied and given effect.

Thus, we hold (1) that defendant was not obligated by the terms of the agreement to submit the grievance in dispute to arbitration, and (2) even if defendant were so obligated that plaintiff is barred from the maintenance of its present action.

The judgment is reversed and the cause remanded, with directions that plaintiff's motion for summary judgment be denied and defendant's motion allowed.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

Thursday, November 21, 1963
Before
Hon. MIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. J. EARL MAJOR, Circuit Judge

[Caption Omitted]

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby REMANDED to the said District Court with directions that plaintiff's motion for summary judgment be denied and defendant's motion allowed, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 12802-12803

March 2, 1960

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Plaintiff-Appellant,

v.

STANDARD OIL COMPANY,
Defendant-Appellee.

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Plaintiff-Appellee,

v.

STANDARD OIL COMPANY,
Defendant-Appellant.

CASTLE, Circuit Judge.

This is an action brought under § 301 of the Labor-Management Relations Act, 29 U.S.C.A. § 185 to compel arbitration under the provisions of a collective bargaining agreement. Independent Petroleum Workers of America, Inc., plaintiff, filed a complaint in the District Court seeking to compel the Standard Oil Company, defendant, to join in

submitting to arbitration two grievances concerning the performance of maintenance and repair work by an independent contractor. The complaint was later amended to ask similar relief with respect to an additional dispute involving the seniority of an employee.

The issue relating to the maintenance and repair work was submitted on the pleadings and a stipulation of facts. Both parties moved for summary judgment on the issue relating to seniority rights. The District Court found for and entered judgment in favor of the defendant in so far as the maintenance and repair work dispute was concerned and the plaintiff appealed. Plaintiff's motion for summary judgment was granted and judgment entered for plaintiff ordering the defendant to join in the submission of the seniority rights dispute to arbitration. Defendant appealed as to this judgment.

The contested issue involved in both appeals is whether the respective grievance or dispute is one with respect to which the parties in their collective bargaining agreement have agreed to arbitration.

The agreement provides for the arbitration of unsettled grievances. Section 10 then imposes limitations on arbitration which, in so far as here pertinent, provide:

> "A. Questions which may be referred to arbitration shall be limited to:
>
> "1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.
>
> "2. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of arbitration awards and written agreements not incorporated in this Agreement.
>
> "3. Questions of applications or interpretations of or alleged noncompliance with past policies, prac-

tices, customs or usages relative to working conditions, and grievances arising from:

"(a) the modification by the Company of any of said policies, practices, customs and usages, or

"(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or

"(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement."

The plaintiff contends that the grievances concerning performance of maintenance and repair work by an independent contractor are arbitrable under the provisions of Section 10 A. (3) of the agreement referring to past practices relative to working conditions.

For many years the defendant has used both its own employees and independent contractors to perform maintenance and repair work at its Whiting, Indiana, Refinery. Approximately 90% of such work has been performed by company employees rather than independent contractors. In using independent contractors to perform maintenance and repair work, certain factors were considered by the defendant; among these were the availability of qualified employees, whether the work involved secret, patented or unique processes or materials, whether the defendant had the equipment to perform the work, whether the independent contractor guaranteed the quality of the work, economic considerations, previous experience with its own employees in similar work, and whether the work was hazardous or disagreeable. Where practicable, defendant uses its own employees, but a partial list of maintenance and repair work contracted out at the Whiting Refinery during the years 1953 to 1958, inclusive, contains over 250 examples of various [redacted] of maintenance and repair work performed by indepe[redacted]t contractors.

Prior to 1952 several collective bargaining agreements be-

tween the parties required submission to arbitration of substantially any dispute. In 1952 the limitations contained in Section 10 A. were incorporated into the agreement. During negotiations in 1955 with relation to modifications and revision of the agreement, the plaintiff Union proposed a "contracting out of work" clause which would have prevented the defendant from contracting any work to independent contractors, provided the defendant had the equipment and qualified employees necessary to perform the work. This proposal was rejected by the defendant. During similar negotiations in 1957 a rejected Union proposal would have precluded the use by defendant of independent contractors for work involving any craft while defendant's own employees with seniority in such craft were performing lower rated labor work, unless defendant's own employees with seniority in the particular craft were returned to their craft jobs and rates while the employees of the independent contractors were performing any work involving the same work in defendant's plant. Again, in 1959, defendant rejected a Union proposal that a clause be incorporated in the agreement which would provide that the company would not contract out work normally performed by the production and maintenance employees at the refinery.

In October of 1957 the defendant contracted with an independent contractor for the performance of certain maintenance and repair work involving the repair and refinishing of stucco walls of a truck garage at the Whiting Refinery and in connection therewith employees of the independent contractor built and tore down a scaffold and performed certain cement or stucco finishing. The incident precipitated the filing of two grievances by plaintiff, as follows:

> "Independent Petroleum Workers of America requests that Carpenters backed down to labor be paid the craft rate for work performed by contractors (scaffold building and tear down) in the Truck Garage."
>
> "The Board of Directors of the Independent Petro-

leum Workers of America requests that as required by the recognition clause of the applicable agreement and established past policy, practice, custom and usage, employees classified as Cement Finishers be assigned and perform all cement finishing work, as established by such past policy, practice, custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work be compensated by the appropriate rate for all time and pay so lost."

Both grievances were denied and the defendant refused to submit them to arbitration on the ground that they were not arbitrable under the terms and provisions of the agreement.

[1] Since *Textile Workers Union of America* v. *Lincoln Mills*, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, the district courts are empowered under § 301 of the Labor-Management Relations Act, 29 U.S.C.A. § 185 to decree specific performance of an agreement to arbitrate a grievance dispute. *Brass and Copper Workers Federal Labor Union, etc.* v. *American Brass Company*, 7 Cir., 272 F. 2d 849. But since arbitration is voluntary and consensual in nature, warrant therefor must be found within the terms and conditions of the bargaining agreement. *Local 1912, International Association of Machinists* v. *United States Potash Company*, 10 Cir., 270 F. 2d 496.

The bargaining agreement between the plaintiff and defendant contains no express reference to the subject of contracting out of any kind of work to independent contractors. The subject matter of a dispute or grievance in order to be arbitrable under the provisions of Section 10 A. (3) of the agreement, relied on by plaintiff, must concern a past policy, practice, custom or usage relative to working conditions.

[2] In our opinion the language of Section 10 A. (3) of the agreement relating to past policies, practices, customs or

usages "relative to working conditions" was not intended to and does not include within its scope the subject of contracting out maintenance and repair work on plant or equipment to independent contractors. *United Steelworkers of America, AFL-CIO* v. *Warrior & Gulf Navigation Company*, 5 Cir., 269 F. 2d 633. This is especially so in view of the history of the negotiations of the parties concerning the performance of work by independent contractors. The continued bargaining on the subject evidences their intent and understanding.

In addition, the stipulated facts concerning the past practice of defendant in letting out maintenance and repair work to independent contractors serve to demonstrate that the subject had always been treated as a matter of managerial prerogative. The defendant in determining what would be done through independent contractors was guided by a number of factors and considerations including practicability and advantages to be derived. That company employees performed 90% of such work does not establish that such result was dictated by a policy relative to "working conditions" as opposed to an exercise of business judgment by management on the various factors involved. There is no disclosure of any pattern in which consideration of employee working conditions operated to restrict the exercise of managerial prerogative.

In *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 6 Cir. 161 F. 2d 949, relied upon by plaintiff, arbitrability of the question of contracting out work was recognized as an interpretation of a management function clause of the agreement there involved. That case is of no assistance to the plaintiff. It supports the defendant's contention that the performance of work by independent contractors is a subject matter within managerial function and prerogative rather than "relative to working conditions." And *Local 1912, International Association of Machinists* v. *United States Potash Company*, 10 Cir., 270 F. 2d 496, 498,

also relied upon by plaintiff, did not involve the limitation upon arbitrable subject matter present in the instant case. The contract there considered was "not couched in terms of specified grievances which are to be arbitrated, thereby excluding all other by implication." Nor did the case involve construction of a "past policies * * * relative to working conditions" clause such as is here relied upon. The case is no authority for finding arbitrability under Section 10 A. (3), relied upon by plaintiff.

[3] The trial judge did not err in refusing to order the defendant to submit the grievances relating to the maintenance and repair work to arbitration. The defendant had not contracted to refer the issue to arbitration. It is only where such a contract has been made and the promise broken that the court will order arbitration. *Local No. 149 of American Federation of Technical Engineers (AFL)* v. *General Electric Company*, 1 Cir., 250 F. 2d 922, certiorari denied, 356 U. S. 938, 78 S. Ct. 780, 2 L.Ed. 2d 813.

The dispute as to seniority rights related to Rolland Hopper, a non-supervisory employee of defendant at the Whiting Refinery. On September 12, 1958, he was advanced from the nonsupervisory classification of crane operator to the supervisory position of "Foreman-Transportation, Pro-Tem" in the crane department. About September 14, 1958, Hopper and certain other Whiting Refinery supervisors were sent to defendant's Mandan, North Dakota, Refinery to perform temporary work at that refinery while its employees were on strike. Hopper and the other foremen were informed that this was a temporary assignment, and all of these foremen remained on the Whiting payroll. About October 3, 1958, Hopper and the other supervisors returned to the Whiting Refinery where Hopper resumed his supervisory duties. About October 20, 1958, Hopper was returned to the non-supervisory classification of crane operator and his seniority rights in the non-supervisory class as they existed before his promotion were recognized.

During the period involved, and since the year 1945, the seniority list of employees, posted in the crane department, pursuant to Article IX, Section 1, of the collective agreement provided:

> "An employee who has been advanced from any hourly rate job, when reduced, will assume a position in any lower classification in line with his service rights in that classification."

The Union protested recognition of Hopper's seniority rights and filed the following grievance:

> "The IPWA Board of Directors requests that the job and departmental dates of Rolland Hopper (1961) be deemed forfeited by virtue of his having accepted supervisory employment at another installation location (Mandan), and that the available employees displaced by him on October 20, 1958 be paid what they would have earned had they not been displaced."

[4] The defendant concedes that there can be no question that the matter of seniority is a condition of employment. Defendant's rule governing seniority constitutes a past practice and policy relative to working conditions within the scope of Section 10 A. (3) of the bargaining agreement. The grievance raised a question as to the interpretation or application of the rule. The District Court did not err in ordering the defendant to join in the submission of this grievance to arbitration.

Each of the judgment orders is affirmed.

Affirmed.

SCHNACKENBERG, Circuit Judge (specially concurring).

I would hold that both of the disputes involved in this case are arbitrable under section 10 A of the agreement.

Office-Supreme Court, U.S.
FILED
MAY 4 1964
JOHN F. [illegible], CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 55

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,

Petitioners.

vs.

AMERICAN OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

RICHARD P. TINKHAM,
DANIEL F. KELLY,
ALLEN W. TEAGLE,
708 Calumet Building,
Hammond, Indiana,

DONALD L. HASTINGS,
910 S. Michigan Avenue,
Chicago 80, Illinois,
Attorneys for Respondent.

TINKHAM, BECKMAN, KELLY AND SINGLETON,
708 Calumet Building,
Hammond, Indiana,
Of Counsel.

THE BURTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 971.

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,

Petitioners,

vs.

AMERICAN OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW

The opinion of the District Court is reported at 215 F. Supp. 1. The opinion of the Court of Appeals for the Seventh Circuit is reported at 324 F. 2d 903.

JURISDICTION

There is a defect in the jurisdiction of this Court on the Petition for Certiorari because of the failure of petitioner to comply with the mandatory requirements of Rule 33(1) of this Court. Petitioner served copies of its Petition for Certiorari on counsel for respondent in Hammond, Indiana.

and Chicago, Illinois, by regular mail, rather than air mail as required by the rule, despite the fact that the distance from Washington, D. C., where the Petition for Certiorari was mailed, is greater than 500 miles.

QUESTIONS PRESENTED.

Under a collective bargaining agreement containing a limited arbitration clause, a limited no-strike clause, and a specific exclusion from arbitration of matters not covered in the contract, the Union seeks arbitration of a matter not covered in the contract, and on an issue previously decided adversely to the Union by the Court of Appeals. The issues presented are:

1. Should this Court again review the well-established principles regarding arbitration of labor disputes in a case where the Court of Appeals found that the employer has not agreed to arbitrate a matter within the terms of a specific exclusion clause of a collective bargaining agreement, which also contained a limited arbitration clause and a limited no-strike clause?

2. Should this Court again review the well-established principles regarding arbitration of labor disputes in a case where the Court of Appeals ruled that an employer was not required to arbitrate a particular dispute, because of the application of settled principles of collateral estoppel?

STATUTE AND REGULATION INVOLVED.

The pertinent statute, being Section 301(a) of the Labor-Management Relations Act, is set forth in the Petition for Certiorari at page 2.

In addition, Rule 33(1) of this Court, hereinbefore referred to, provides as follows:

"1. Whenever any pleading, motion, notice, brief

of other document is required by these rules to be served, such service may be made personally or by mail on each adverse party. If personal, it shall consist of delivery, at the office of counsel of record, to counsel or a clerk therein. If by mail, it shall consist of depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at his post office address. Where the person on whom service is to be made resides 500 miles or more from the person effecting service, such mailing must be made with air mail postage prepaid."

STATEMENT OF THE CASE.

This is an action like *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962), in which the Court of Appeals of the Seventh Circuit ruled that an employer was not required to arbitrate a grievance which it had not agreed to submit to arbitration.

This action was brought by the plaintiff, an incorporated labor union ("Union"), under and by virtue of *Section 301 of the Labor-Management Relations Act of 1947* (29 USC Sec. 185) to require the defendant, *American Oil Company* ("American") to submit to arbitration a complaint that American had breached the collective bargaining agreement in effect between the parties by contracting out crane work to an independent contractor. (Joint App. pp. 4 to 6.) The Court of Appeals held (1) that American was not obligated by the terms of the collective bargaining agreement to submit the grievance in dispute to arbitration, and (2) even if American were so obligated, the plaintiff union was barred from the maintenance of its present action by collateral estoppel. (App. A, p. 33.)

The collateral estoppel was based upon a prior decision by the same court (*Independent Petroleum Workers of America, Inc.* v. *Standard Oil Company*, 275 F. 2d 706 (7th Cir. 1960)) involving the same issue between the same

parties and the same terms of the collective bargaining agreement. In this prior decision, the Court of Appeals had ruled that American had not agreed to arbitrate its right to contract out work. (App. C, pp. 35 to 42.)

On October 17, 1960, American entered into a contract with an independent contractor for the performance of work involving the demolition of certain buildings and oil refining facilities within its Refinery in Whiting, Indiana; using the cranes and operators of the contractor. (Joint App. p. 34.) The Union filed a grievance complaining about the action of the Company in contracting out this crane work. American denied the grievance, whereupon the Union asked that the matter be submitted to arbitration, to which American replied that the issue was not eligible for arbitration under the terms and provisions of the collective bargaining agreement. (Joint App. p. 35.)

On June 2, 1961, the Union filed a complaint seeking to compel arbitration of the issue in the District Court at Hammond, Indiana. After a Rule 12 motion addressed to the Complaint was sustained, the Union filed an Amended Complaint in two paragraphs upon which the case was submitted. (Joint App. pp. 4 to 8.) Issues were formed by Answer in three paragraphs addressed to the Amended Complaint. (Joint App. pp. 24 to 28.)

The Union filed a Motion for Summary Judgment on legal paragraph 1 of its Complaint with Affidavit in support thereof. (Joint App. pp. 20 to 23.) American also filed a Motion for Summary Judgment and Affidavit in support. (Joint App. pp. 28 to 40.)

For many years American had used both its own employees and independent contractors to perform certain work at its Whiting Refinery. (Joint App. p. 32.) In using independent contractors, certain factors were considered by American; among these are the availability of qualified

employees, whether the work involved secret, patented or unique processes or materials, whether American had the equipment to perform the work, whether the contractor guaranteed the quality of the work, economic considerations, previous experience with its own employees in similar work and whether the work was hazardous or disagreeable. (Joint App. p. 31.)

Where practicable, American has used its own employees but for many years American has contracted with independent contractors to perform a wide variety of work, including pipe fabrication, electrical repairs, pipe cleaning, brass foundry work, tool making and others.

Likewise for many years, American has caused crane operating work at its Whiting Refinery to be performed by its own employees and by independent contractors. (Joint App. p. 32.) In the period from 1957 to 1960, inclusive, thirty-one separate contracts for crane work alone were let to independent contractors at the Whiting Refinery. (See List, Joint App. pp. 37 and 38.)

Prior to the year 1950, the collective bargaining agreement between the parties contained a broad arbitration clause which provided that any and all differences between the parties were compulsorily arbitrable. As a result of negotiations between the parties in 1952, an agreement limiting the arbitration clause was reached as expressed in the following language, which has been re-adopted in each of the several collective bargaining agreements reached by the parties since that year and was in effect at all times pertinent herein:

> "Section 10. As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration shall be limited to:
>
> "1. Questions directly involving or arising

from applications, interpretations or alleged violations of the terms of this agreement.

"2. Questions directly involving or arising from applications, interpretations, or alleged violations of the terms of arbitration awards and written agreements not incorporated in this Agreement.

"3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from:

"(a) the modification by the Company of any of said policies, practices, customs and usages, or

"(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or

"(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement.

"D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate." (Joint App. pp. 12 and 13.)

This came into being as a result of hard bargaining. The violent objections of the union to the company's proposals to limit the arbitration clause are illustrated by its bulletin to members protesting the proposed change. (Joint App. pp. 39 and 40.)

In addition to the bargaining history on the arbitration clause itself, the record in this case shows that in the years 1955, 1957, 1959 and 1961, the Union attempted to bargain for proposals which would have placed limitations and restrictions on the Company's right to employ independent contractors. Each of these proposals was rejected by American, and the arbitration clause remained the same. (For details of these proposals, see Joint App. pp. 32 to 34.)

On March 13, 1963, the District Court entered an order denying American's Motion for Summary Judgment as to paragraphs I and II of the Amended Complaint and dismissing paragraph II of the Amended Complaint as "moot". The District Court granted the Union's Motion for Summary Judgment on legal paragraph I of its Complaint. (Joint App. p. 43.)

The Court of Appeals reversed the ruling of the District Court and directed the District Court to grant the motion of American for summary judgment on the ground that American had not agreed to arbitrate its right to contract out work; and on the further ground that the prior decision of the court involving the same parties and the same issue precluded the Union from pursuing the instant action because of collateral estoppel. (App. A. pp. 25 to 34.)

The Court of Appeals cited *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) and *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960) and distinguished those cases from the instant case on factual grounds, such as the difference in the scope of the arbitration clause and the difference in the exclusion clause. (App. A. pp. 26 to 28.)

The Court of Appeals also based its unanimous de-

cision upon the application of the doctrine of collateral estoppel. After examining the pleadings, briefs and opinion of the Court of Appeals in the former case (*Independent Petroleum Workers of America, Inc. v. Standard Oil Co.*, 275 F. 2d 706 (7th Cir., 1960)), the Court concluded that the issue presented in the instant case and the prior case were the same and therefore the doctrine of collateral estoppel was applicable. (App. A. pp. 29 to 33.)

ARGUMENT.

It was settled both before and after the decisions of this Court in the cases known as the trilogy that an employer is required to arbitrate only matters which it has agreed to arbitrate under the terms of the collective bargaining agreement. In view of this basic and fundamental rule, respondent believes that it is important to note the following significant elements which are present in this case and will be discussed briefly in the following sections of this brief:

1. The arbitration clause in the agreement under consideration herein states that arbitration will be "limited to" certain designated matters.

2. The arbitration clause in the agreement under consideration herein contained a specific exclusion clause (Subsection D) which provided expressly that the Company would bargain with the Union on matters not covered in the agreement, but that the Company retained the right to refuse to arbitrate such matters and provided that the Union had the right to strike on such issues when the Company declined to arbitrate.

3. The collective bargaining agreement does not contain an absolute no-strike clause, and, therefore, petitioner had a right to strike when respondent refused to arbitrate the issue of contracting out work.

4. The collective bargaining agreement contains no reference whatever to the contracting out of work or the arbitration of the Company's right to contract out work; and since the exclusion clause specifically includes items not covered in the agreement, this issue is expressly within the exclusion clause.

5. The bargaining history between the parties establishes a limitation of the scope of the arbitration clause by the Company during negotiations (over the strenuous objection of the Union); and also establishes a bargaining history of unsuccessful attempts by the Union to limit the right of the Company to contract out work.

6. The arbitration clause in the instant case had previously been construed by the Court of Appeals, and the Court of Appeals had previously held that the Company had not agreed to arbitrate its right to contract out work.

A. There Is No Conflict of Decisions.

The decision of the Court of Appeals in this case is consistent with and does not conflict with any decisions of this Court or any decisions of the Courts of Appeal of other circuits.

In the hope of inducing this Court to again review the well-established rules regarding the arbitrability of disputes between a company and union under particular collective bargaining agreements, petitioner asserts that the decision of the Court of Appeals in this case is squarely in conflict with the decisions of this Court in *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); and is also in conflict with the decisions of other circuits.

Petitioner then attempts to support this contention by isolating the factual differences between this case and the cases of *United Steelworkers* v. *American Mfg. Co.* and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, and then arguing that each of these differences, as so isolated and treated separately, brings this case within the rule of *Warrior & Gulf* that the employer has agreed to arbitrate the dispute.

Respondent has never contended and does not now contend (nor did the Court of Appeals hold) that any one of the many factual distinctions between this case and *Warrior & Gulf*, considered separately and by itself, was sufficient for the application of the rule that the employer had not agreed to arbitrate a particular dispute. Respondent has contended, still contends, and the Court of Appeals has twice held that the obvious factual differences between this case and *Warrior & Gulf*, such as the limited arbitration clause, the specific exclusion clause, the lack of an absolute no-strike clause, and a bargaining history of limitations of the arbitration clause in bargaining negotiations do bring this case within the rule that the employer has not agreed to arbitrate this grievance.

The fact that the decision in this case is not in conflict with any decisions of this Court is illustrated by the statement of the applicable rule in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960) in the following language:

> "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

This same rule was reaffirmed by this Court in the later case of *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962) (a case appealed from the Seventh Circuit), in the following language:

> "Under our decisions, whether or not the Company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. 'The Congress * * * has by Sec. 301 of the Labor-Management Relations Act, assigned the courts the

> duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582, 4 L. Ed. 2d 1409, 1417, 80 S. Ct. 1347. See also *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 570, 571, 4 L. Ed. 2d 1403, 1432, 80 S. Ct. 1343, 1363 (Concurring Opinion). We think it unquestionably clear that the contract here involved is not susceptible to a construction that the Company was bound to arbitrate its claim for damages against the Union for breach of the undertaking not to strike."

While it is true that this Court, in deciding the three cases known as the trilogy, has established a rule favoring arbitrability of labor disputes, and also true that the courts, in following this rule, have ordered arbitration in a great majority of cases decided since 1960, it is not true, as counsel for petitioner would have the Court believe, that any case in which arbitration is not ordered is a case squarely in conflict with the decisions of this Court.

In a number of cases where the arbitration clause is limited and the exclusion clause specific and clear, such as the instant case, the courts have followed the rule of this Court that arbitration is a matter of contract and have declined to order arbitration in such cases. *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962); *Local 201, International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *General Electric Co.*, 283 F. 2d 147 (1st Cir. 1960); and *Local 787, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *Collins Radio Co.*, 317 F. 2d 214 (5th Cir. 1963).

Petitioner argues on pages 11 and 12 of its Petition for Certiorari that the Court of Appeals erred in holding, in the instant case, that the Union's argument that a mere

allegation that the agreement was violated, ipso facto, entitles the Union to arbitration was "devoid of all logic." Petitioner argues that the Union's contention is precisely what the court held in the *American Manufacturing* case and cites the language from that case to the effect that "'the function of the court' * * * 'is confined to ascertaining whether the party seeking arbitration is making a claim which *on its face* is governed by the contract.'" (Our emphasis.) Respondent submits that there is a considerable difference in a ruling that a claim "which on its face is governed by the contract" is arbitrable as against a ruling that "any claim" which the Union would "allege" was arbitrable would, automatically and by virtue of such allegation, become arbitrable.

Respondent submits that the specious nature of this argument is further illustrated by the fact that this contention, if accepted by the Court, would require the respondent to arbitrate any and every dispute which plaintiff would "allege" constituted a violation of the collective bargaining agreement. Such an argument would seem to be fallacious on its face because the collective bargaining agreement in this case provides that matters subject to arbitration shall be "limited to" and then goes on to provide the specific matters which would be subject to arbitration and matters which specifically are stated as not subject to arbitration.

Other courts presented with similar contract language allowing arbitration of "alleged" or "claimed" grievances or contract violations have not accepted the argument that arbitrability necessarily and automatically follows from such language.

Thus in *Pacific Northwest Bell Telephone Co. v. Communications Workers of America*, 310 F. 2d 244, 246 (9th Cir. 1962), the court declined to compel arbitration of the

matter in dispute despite the following language in the collective bargaining agreement:

> "The provisions for arbitration shall apply only to controversies. * * * regarding the true intent and meaning of any provision of this contract or regarding a *claim* that either party hereto has not fulfilled a commitment made in this contract." (Our emphasis.)

Also in the case of *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 217 F. Supp. 622, 623 (W. D. Pa. 1963), the court refused to order arbitration of the dispute involved despite the fact that the collective bargaining agreement in that case provided for the arbitration of:

> "(1) The interpretation, application, or *claimed violation* of a provision of this agreement or of a local supplement in effect in the bargaining unit in which the grievance arose, or * * *." (Our emphasis.)

The same contention that mere allegation of a contract violation creates an arbitrable issue has been considered and rejected by other courts. See *Parking Enterprises, Inc.* v. *International Union, Allied Industrial Workers of America, Local 199*, 43 L. C. 25601, par. 17,285 (1961); and *Local 201, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *General Electric Co.*, 262 F. 2d 265 (1st Cir. 1959).

It should also be pointed out that the collective bargaining agreement in this case limits arbitrations to "questions *directly* involving or arising from applications, interpretations, or alleged violations of the terms of this agreement." (Our emphasis.) Since there is no reference whatever in the collective bargaining agreement to the contracting out of work, this issue cannot be one of "the terms of this agreement." Thus, the dispute over contracting out is as indirect, remote, and collateral to the agreement as any dispute could be.

Petitioner argues on page 13 of its Petition for Certiorari that the Court should have ordered arbitration of this grievance under the provisions of subsection (3) of the arbitration clause which provides for arbitration of "alleged noncompliance with past policies, practices, customs or usages relative to working conditions." Petitioner makes this argument despite the fact that it admits on page 7 of its Petition for Certiorari that the Union voluntarily abandoned its claim that this grievance was arbitrable under subsection 3 and despite the fact that the record shows (Joint App. p. 43) that the District Court dismissed paragraph II of petitioner's Amended Complaint in this case, which was the paragraph alleging that the present grievance was arbitrable under the provisions of subsection (3) of the arbitration clause.

On page 14 of its Petition for Certiorari, petitioner assails the contention of respondent that this case differs from *American Manufacturing* and *Warrior & Gulf* on the ground that those two cases involved agreements with absolute no-strike clauses, while the agreement in this case permits strikes over matters "not covered in this agreement."[1] Petitioner attacks this contention of respondent by isolating it from all other differences between this case and *American Manufacturing* and *Warrior & Gulf* and then contending that those two decisions are not limited in their applicability to agreements containing absolute no-strike obligations. Petitioner also characterizes this argument of respondent as "totally lacking in merit."

1. The same counsel who characterizes respondent's argument as to the significance of an absolute no-strike clause as "totally lacking in merit" took an entirely different position on the significance of this issue when presenting the trilogy cases to this Court. In his brief filed in those cases, counsel made the following contentions regarding the significance of an absolute no-strike clause:

> "There is no requirement that the terminal point of the grievance procedure be arbitration. In many agreements the union reserves the right to strike if grievances are not resolved.

(Footnote continued on page 16)

Petitioner states in a footnote on page 15 of its Petition for Certiorari that "the only decision of which we are aware that seems to hold that the principles of *American Mfg.* and *Warrior & Gulf* are inapplicable where there is

But the Labor-Management Relations Act of 1947 declared that the most desirable method for the settlement of grievance disputes was arbitration. Where this statutory policy is fully effectuated in a collective bargaining agreement, as in these cases, we have an agreement for a fixed term which sets the standards to be applied in the employment relationship, which provides a grievance procedure in which management's actions in particular cases can be tested, and which provides both an arbitration provision for unresolved grievances and an absolute prohibition of strikes during its term. Such agreements should be enforced in a manner consistent with the legislative policy that all matters in dispute during the term of an agreement should be resolved through arbitration.

"The generous scope which should be given to an agreement to arbitrate grievances is emphasized by two facts. First, if the agreement contains an absolute ban against strikes, it constitutes a complete code governing the employment relationship." (Pet. Brief pp. 20 and 21.)

"It is possible, of course, for the parties to exempt certain subjects from the agreement, preserving their freedom to negotiate, and to strike, over issues on which they cannot reach agreement as to the standard to be applied. This is the practice, for example, in the automobile industry, where the parties deliberately refrain from establishing the standards to govern the critical question of the speed of the production line. This issue is kept as an issue on which the union, after the necessary preliminary negotiations, retains the right to strike even during the term of the agreement.

"The usual practice in American industry, however, is exemplified in the three cases now before this Court. In these cases there is no contemplation of the addition of new provisions to the agreement during the term, or of negotiation with the right to strike on subjects omitted from the agreement. The agreement is intended to govern the total employment relationship." (Pet. Brief p. 36.)

"* * * We contend only that an agreement to arbitrate 'any question of interpretation and application' of a collective bargaining agreement must be construed to mean that whenever either party claims that the agreement has been violated an arbitrable question is presented. This is the only construction which would permit grievance arbitration to perform its function as a substitute for the strike, and as the *quid pro quo* for an absolute agreement not to strike." (Pet. Brief p. 50.)

a right to strike is *Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 217 F. Supp. 622 (W. D. Pa. 1963)." Respondent had never contended and does not now contend that the lack of an absolute no-strike clause makes the principles of *American Mfg.* and *Warrior & Gulf* inapplicable. Respondent does contend that the absence of an absolute no-strike clause is a significant element to be considered by the Court, along with other factors such as the scope of the arbitration clause and the exclusion clause. Other cases which have noted the significance of an absolute no-strike clause are: *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); and *Harris Structural Steel Co.* v. *United Steelworkers*, 298 F. 2d 363 (3rd Cir. 1962), Cert. denied 369 U. S. 851 (1962).

B. Collateral Estoppel Is a Proper Basis for the Decision of the Court of Appeals.

On page 17 of its Petition for Certiorari, petitioner states that the Court of Appeals erred in relying upon the doctrine of collateral estoppel in its decision in the instant case. Petitioner lists three reasons for this contention. The specious character of the reasons given is hereinafter indicated by the following answer to each reason.

The first reason of petitioner is as follows:

> "(1) A decision on an issue of law rendered in an earlier suit for breach of contract does not operate as a collateral estoppel in a subsequent suit brought on another contract, even though the language of both contracts may be identical." (Pet. for Cert. p. 17.)

Petitioner attempts to support this first alleged reason with a carefully selected quotation from the decision of this Court in *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948)

which appears on pages 21 and 22 of the Petition for Certiorari. Petitioner completes its quotation on page 602 of the *Sunnen* decision; and the next sentence in the decision, which petitioner omits, is as follows:

> "*For income-tax purposes*, what is decided as to one contract is not conclusive as to any other contract which is not then in issue, however similar or identical it may be." (Our emphasis.)

The second reason is as follows:

> "(2) The doctrine of collateral estoppel does not apply where, between the first action and the second one, intervening judicial decisions have rendered the first decision obsolete." (Pet. for Cert. pp. 17 and 18.)

Obviously, petitioner is contending that the decision relied upon by the Court of Appeals for the application of the doctrine of collateral estoppel is no longer the law. It is submitted, however, that the decision of this Court in *Warrior & Gulf* is not inconsistent in any way with the earlier decision of the Court of Appeals in the prior *Independent Petroleum Workers* case. The rule followed by each court is the fundamental rule that an employer cannot be compelled to arbitrate any matter it has not agreed to submit to arbitration.

In *Independent Petroleum Workers of America, Inc.* v. *Standard Oil Co.*, 275 F. 2d 706, 709, 710 (7th Cir. 1960)[2] the

2. In a footnote on page 5 of its Petition for Certiorari, petitioner infers that the Seventh Circuit has itself abandoned the ruling made in *Independent Petroleum Workers of America* v. *Standard Oil Company* by stating:

> "The Seventh Circuit has since characterized its holding in this case in the following language: 'Until June 20, 1960, when *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, was decided * * * most federal courts, including this Court (*Independent Petroleum Workers of America* v. *Standard Oil Co.*, 275 F. 2d 706) held that management had a right to contract out work * * *.' *International Union, UAW, Local 391* v. *Webster Electric Co.*, 299 F. 2d 195, 196-197 (1962)."

(Footnote continued on page 19)

Court stated the rule in the following language:

> "But since arbitration is voluntary and consensual in nature, warrant therefore must be found within the terms and conditions of the bargaining agreement . . . the defendant had not contracted to refer the issue to arbitration."

In *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960), the Court stated the same rule in the following language:

> "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

The last of the three reasons is as follows:

> "(3) Even if the doctrine of collateral estoppel were applicable in this action, it could not bar the plaintiff's claim under subparagraph 1 of Section 10A of the agreement (providing for arbitration of alleged violations of the agreement), since the earlier action was based solely on subparagraph 3 (providing for arbitration of alleged non-compliance with past practice)." (Pet. for Cert. p. 18.)

When the portions of the paragraph in the decision which were omitted by counsel for the petitioner are included, it is clear that the Court was simply paraphrasing the contentions made by plaintiff and defendant in their briefs. The complete quotation is as follows:

> "We approach the problem presented to us by noting that, until June 20, 1960, when *United Steelworkers of America, AFL-CIO* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 80 S. Ct. 1347; 4 L. Ed. 2d 1409, was decided *according to plaintiff's brief*, most federal courts, including this court (*Independent Petroleum Workers of America* v. *Standard Oil Co.*, 275 F. 2d 706) held that management had a right to contract out work, *and according to defendant's brief, before Steelworkers and since, management has had such right unless it is limited by the terms of the bargaining agreement*." (Our emphasis.)

The portions of the foregoing quotation which are italicized are the portions which petitioner's counsel omitted in the Petition for Certiorari.

This third contention of petitioner is very cogently answered in the decision of the Court of Appeals where the Court, in answer to plaintiff's contention there that the cause of action was different, states that after carefully examining "the briefs, pleadings and opinions of this Court filed in the former case, as well as the briefs and pleadings before us in the instant case" this Court concludes "that plaintiff in both cases has presented the same claim or demand, that is, that defendant be required to arbitrate the dispute in question." (App. A. pp. 29 and 30)

A further answer to petitioner's contention that collateral estoppel is not applicable because the earlier decision was restricted to Section 10A (3) whereas the later decision was based upon Section 10A (1) is the fact that the decision of the Court of Appeals in the earlier case quotes the entire arbitration clause, including Section 10A (1) and Section 10A (3), and the quotation in the decision is preceded by the following sentence:

> *Independent Petroleum Workers of America, Inc.* v. *Standard Oil Co.*, 275 F. 2d 706, 707 (7th Cir. 1960).
>
> "Section 10 then imposes limitations on arbitration which, *insofar as here pertinent*, provide:" (Our emphasis.)

In a final effort to induce this Court to again consider the settled rules established in the trilogy, petitioner asserts on page 17 of its Petition for Certiorari that the decision of the Court of Appeals in this case, if permitted to stand, will once again encourage employers to resist arbitration of grievances which are plainly arbitrable. Respondent submits that it is extremely unlikely that any employer would attempt to resist arbitration of a grievance on the authority of a decision based on collateral estoppel.

CONCLUSION.

In conclusion, respondent submits that the Petition for Certiorari should be denied because: (1) There is no issue presented which is significant enough to justify the time of this Court in again reviewing legal principles already established, (2) there is no reason for this Court to review a decision based on collateral estoppel, and (3) there is no conflict between the decision in this case and the decisions of this Court or the Courts of Appeal of other Circuits.

Respectfully submitted,

RICHARD P. TINKHAM,
DANIEL F. KELLY,
ALLEN W. TEAGLE,
708 Calumet Building,
Hammond, Indiana,

DONALD L. HASTINGS,
910 S. Michigan Avenue,
Chicago 80, Illinois,
Attorneys for Respondent,
American Oil Company.

TINKHAM, BECKMAN, KELLY AND SINGLETON,
708 Calumet Building,
Hammond, Indiana,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1963

No. 971

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Petitioner,

v.

AMERICAN OIL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

We would like, at the outset, to comment briefly on Respondent's contention that this Court lacks jurisdiction because the petition for certiorari was served by first class mail, rather than by air mail as required by Rule 33 of the Rules of this Court. We intended to serve the petition by Air Mail, and certified to the Court that it had been so sent. If, through a clerical error, insufficient postage was affixed, we apologize to the Court. As far as Respondent is concerned, however, the error was harmless, since the petition was mailed on Friday, April 3, and received the following business day, Monday, April 6. Moreover, the time to file an opposing brief runs from the date the petition is received by Respondent. Rule 24.

As to Respondent's argument on the merits, little is required in the way of a reply. Perhaps it might be helpful to the Court, however, if we commented briefly on each of the six factors advanced by Respondent on pages 9 and 10 of its brief as grounds for justifying a different result in the

present case than was reached by this Court in *American Manufacturing* and *Warrior & Gulf*.

> "1. The arbitration clause in the agreement under consideration herein states that arbitration will be 'limited to' certain designated matters."

The arbitration clause is limited in precisely the same manner in which the arbitration clauses involved in *American Manufacturing* and *Warrior & Gulf* were limited. Although the agreement in this case contains a grievance procedure which permits the processing of all "questions upon which employees covered by this Agreement desire consideration," arbitration is "limited" to "alleged violations of the terms of this agreement" or "alleged noncompliance with past policies, practices, customs or usages" (as well as certain other matters not here relevant). The agreement in *Warrior & Gulf* had a similarly broad grievance procedure coupled with a similarly limited arbitration provision; the agreement in *American Manufacturing* limited both the grievance procedure and arbitration to questions concerning the application and interpretation of the agreement.

Prior to 1950, as Respondent states (Br. p. 5), the parties had an arbitration provision as broad as the present grievance procedure (J. A. 39). It provided for arbitration not only of questions arising under the agreement, but also of "questions pertaining to rates of pay, wages, hours of employment, or other conditions of employment *not covered by the contract.*" (J. A. 39, emphasis added). Under that provision, the union would have had the right to arbitrate a claim or request which is based neither on the agreement or past practice. For example, it could have processed through arbitration a claim that management's decision to contract out certain work was simply unfair. Such a claim can be processed as a grievance under the present agreement, but it would not be subject to arbitration.

But in this case, as in *American Manufacturing* and *War-*

rior & Gulf, the union's claim is not that management has acted unfairly, but that it has acted in violation of the agreement and past practice. That is precisely the kind of claim which is subject to arbitration under the "limited" arbitration clause involved here, just as similar claims were held arbitrable by this Court under similarly "limited" arbitration provisions in *American Manufacturing* and *Warrior & Gulf*.

> "2. The arbitration clause in the agreement under consideration herein contained a specific exclusion clause (Subsection D) which provided expressly that the Company would bargain with the Union on matters not covered in the agreement, but that the Company retained the right to refuse to arbitrate such matters and provided that the Union had the right to strike on such issues when the Company declined to arbitrate."

When the parties agreed to limit their previously all-inclusive arbitration clause to questions arising under the agreement, they also adopted Subsection D, which provides that the company need not arbitrate matters "not covered in the agreement," but that the union shall have the right to strike over such matters. This provision simply excludes from arbitration any union claim or request which is *not* based on the agreement, and gives the union the right to strike over such a claim or request. The grievance in this case, however, claims that the company has violated the agreement. The merits of that claim, of course, are for the arbitrator, but whatever its merits the claim is plainly one which is "covered in the agreement."

> "3. The collective bargaining agreement does not contain an absolute no-strike clause, and, therefore, petitioner had a right to strike when respondent refused to arbitrate the issue of contracting out work."

It is true that the agreement in this case does not contain

an absolute no strike clause. It does not follow, however, that the union had the right to strike over the grievance in this case. The agreement preserves the right to strike only with respect to matters "not covered in this Agreement," and, as indicated above, the union in this case is claiming rights *under* the agreement. It is not at all clear that the union would have the right to strike over such a claim. The agreement seems to contemplate that arbitration would be the sole remedy for alleged violations of the agreement.

Moreover, as we pointed out in the petition, the court below did not rely on the absence of an absolute no-strike clause as a basis for its decision. If it had, this would be an additional ground for granting certiorari, since the decision would then be in direct conflict with the decisions of three other Circuits (see cases cited in Pet. p. 14) as well as the concurring opinion in *American Manufacturing* and *Warrior & Gulf* (363 U. S. at 564). However, since the court below did not rely on this argument, it is totally lacking in support, as well as logic, and therefore deserving of no consideration by this Court.

> "4. The collective bargaining agreement contains no reference whatever to the contracting out of work or the arbitration of the Company's right to contract out work; and since the exclusion clause specifically includes items not covered in the agreement, this issue is expressly within the exclusion clause."

The agreement in *Warrior & Gulf*, of course, also contained no express reference to contracting out of work. Indeed, the whole point of the *Warrior & Gulf* opinion is that collective bargaining agreements necessarily cover many matters, such as contracting-out, which are not expressly mentioned but which nevertheless are subject to arbitration. This Court expressly recognized that "contracting out work is the basis of many grievances" under agreements which

have no express reference to contracting out. 363 U. S. at 584 and n. 8.

And as we have already stated, above, the "exclusion" clause in the agreement in the present case simply excludes from arbitration union claims which are *not* based on the agreement; it has no application to the grievance in this case, which *is* based on the agreement.

> "5. The bargaining history between the parties establishes a limitation of the scope of the arbitration clause by the Company during negotiations (over the strenuous objection of the Union); and also establishes a bargaining history of unsuccessful attempts by the Union to limit the right of the Company to contract out work."

As we have indicated, the parties once had an arbitration clause which permitted arbitration not only of questions arising under the agreement, but also of "questions pertaining to rates of pay, wages, hours of employment, or other conditions of employment *not covered by the contract.*" (J. A. 39, emphasis added). The fact that the agreement no longer permits arbitration of matters outside the agreement does not, of course, affect the union's right to arbitrate alleged violations of the agreement or past practice, which are expressly made arbitrable under the terms of the current agreement.

The union's unsuccessful efforts in the past to obtain express contractual restrictions on the company's right to contract out work are irrelevant to the arbitrability of the grievance in this case, just as the similar bargaining history in *Warrior & Gulf* was irrelevant to the arbitrability of the grievance in that case. Such bargaining history would only be relevant to the argument on the merits before the arbitrator.

> "6. The arbitration clause in the instant case had previously been construed by the Court of Appeals, and

the Court of Appeals had previously held that the Company had not agreed to arbitrate its right to contract out work."

This argument was fully dealt with in the petition, and no further reply is required here. It should be noted, however, that prior to this Court's decision in *American Manufacturing* and *Warrior & Gulf*, a number of federal courts had misconstrued arbitration clauses in collective bargaining agreements. If the Company's argument in this case were correct, it would mean that such erroneous decisions would be forever binding on the parties involved, even in cases involving different grievances under different contracts, despite the fact that the decisions are inconsistent with the subsequent decisions of this Court. As we demonstrated in our petition, the law of collateral estoppel does not require such an unjust and anomalous result.

Respectfully submitted,

WILLIAM BELSHAW
BENEDICT R. DANKO
1450 119th Street
Whiting, Indiana 46394

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Petitioner

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No. 55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.
Petitioner

v.

AMERICAN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

WILLIAM BELSHAW
BENEDICT R. DANKO
1450 119th Street
Whiting, Indiana 46394

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Petitioner

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BRIEF FOR PETITIONER

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of Indiana (R. 38) is reported at 215 F. Supp. 1. The opinion of the United States Court of Appeals for the Seventh Circuit (R. 43) is reported at 324 F. 2d 903.

JURISDICTION

The judgment of the court of appeals (R. 54) was entered on November 21, 1963. A timely petition for rehearing was denied by the court on January 6, 1964 (R. 54). The petition for certiorari was filed in this Court on April 3, 1964, and granted on May 18, 1964 (R. 55). This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Under a collective bargaining agreement providing for arbitration of "alleged violations of the terms of this agreement" and of "questions of . . . alleged noncompliance with past practices, customs or usages relative to working conditions," a union seeks arbitration of a claim that management violated the "recognition" clause of the agreement and departed from past practice in contracting out certain work. The questions presented are:

1. Should the court order arbitration of the grievance, notwithstanding its belief that neither the "recognition" clause nor past practice limited the right of management to contract out work?

2. Is the doctrine of "collateral estoppel" a proper basis for denying arbitration of such a grievance, where in a prior action, involving another contracting-out grievance arising under an identical arbitration clause in an earlier agreement, the court had denied arbitration on grounds which have subsequently been repudiated by decisions of this Court?

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This is an action under Section 301 of the Labor Management Relations Act to compel an employer to arbitrate a grievance in accordance with the arbitration provision of the parties' collective bargaining agreement. The union which brought the suit, and which is the petitioner in this Court, is the Independent Petroleum Workers of America, Inc. (hereinafter referred to as the Union). The employer, which is respondent in this Court, is the American Oil Company. For all purposes relevant to this case, American Oil Company is the successor to the Standard Oil Company of Indiana, and both will be referred to herein interchangeably as "the Company."

The Union for many years has been the bargaining representative of the approximately 3,000 production and maintenance employees at the Company's oil refinery at Whiting, Indiana. In that capacity, the Union has negotiated a series of collective bargaining agreements with the Company.

The present case arises under the collective bargaining agreement between the parties which was executed on August 27, 1959. Article II of that agreement (R. 9) established an all-embracing "Grievance Procedure," under which all questions or disputes arising during the term of the agreement were to be handled. It provided for a series of steps, consisting of conferences between Union and Company representatives at ascending levels of authority, and further provided, in Section 9, that matters not resolved in these steps could be referred by either party to arbitration. Section 10, however, provided "as a specific limitation on the foregoing Section 9 of this Article II," the following:

> "A. Questions which may be referred to arbitration shall be limited to:
>
> 1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.

2. Questions directly involving or arising from applications, interpretations, or alleged violations of the terms of arbitration awards and written agreements not incorporated in this Agreement.
3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, and grievances arising from:
   (a) the modification by the Company of any of said policies, practices, customs and usages, or
   (b) the discontinuance by the Company of any of said policies, practices, customs and usages, or
   (c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement.

* * *

"D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate." (R. 11-12).

In October, 1960, the Company contracted out certain crane-operating work (R. 30). The Union filed a grievance, in accordance with the procedure specified in the

agreement, alleging that the Company's action was in violation of the agreement and in conflict with past practice:

> "The Board of Directors of the IPWA requests that, as required by the recognition clause of the applicable agreement and established past practice, policy, custom and usage, employees of the crane department be assigned and perform all crane operating work, as established by such past policy, practice, custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work, be compensated by the appropriate rate for all time and pay so lost." (R. 19).

This grievance was processed through the preliminary steps of the grievance procedure but no settlement was reached, and the Union requested arbitration. The Company refused, and the present action was then instituted.

The Prior Litigation

Before describing the proceedings in the present case, it is necessary to summarize a prior litigation between the parties on which the Company in the present case has based a defense of collateral estoppel.

In October, 1957, under a prior collective bargaining agreement, a grievance had arisen concerning the contracting out of certain maintenance and repair work: the erection and tearing down of a scaffold and the performance of cement and stucco finishing in connection with the repair of a garage.[1] The grievance procedure of the agreement which was then in effect was identical to the one involved in the present case. The parties processed the grievance

[1] The facts here described are set forth in the opinion of the Court of Appeals in *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (7th Cir. 1960), which is reprinted in Appendix C to the petition for certiorari.

under that procedure but failed to settle it, and the Company refused to arbitrate. The Union therefore filed an action under Section 301 to compel arbitration.

In that case, the Union based its action solely on subparagraph (3) of Section 10A of Article II of the Agreement, which provides for arbitration of "questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions. . . ."

The District Court refused to order arbitration. *Independent Petroleum Workers* v. *Standard Oil Co.*, 44 LRRM 2676 (N.D. Ind. 1959). The Court of Appeals for the Seventh Circuit affirmed. *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (reprinted in Appendix C of the Petition for Certiorari).

In reaching its conclusion, the Seventh Circuit relied heavily on the decision of the Fifth Circuit in *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 269 F. 2d 633, and, like the Fifth Circuit, decided essentially that the grievance was not arbitrable because both the negotiating history and the past practice of the parties on the substantive issue of contracting out made it clear that the grievance was without merit. The critical section of the opinion reads as follows:

> "In our opinion the language of Section 10A.(3) of the agreement relating to past policies, practices, customs or usages 'relative to working conditions' was not intended to and does not include within its scope the subject of contracting out maintenance and repair work on plant or equipment to independent contractors. *United Steelworkers of America, AFL-CIO* v. *Warrior & Gulf Navigation Company*, 5 Cir., 269 F. 2d 633. This is especially so in view of the history of the negotiations of the parties concerning the performance of work by independent contractors. The con-

tinued bargaining on the subject evidences their intent and understanding.

"In addition, the stipulated facts concerning the past practice of defendant in letting out maintenance and repair work to independent contractors serve to demonstrate that the subject had always been treated as a matter of managerial prerogative." 275 F. 2d at 709.

The court of appeals decision issued on March 2, 1960. On June 20, 1960, this Court reversed the *Warrior & Gulf* case on which the Seventh Circuit had relied. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960).

The Proceedings In The Present Case

The crane work involved in the present case was contracted out in October, 1960. The Union's complaint sought arbitration under the agreement of August 27, 1959, which had been negotiated while the prior litigation was pending. The complaint was in two parts. It alleged, first, that the grievance was arbitrable under subparagraph (1) of Section 10A, which provides for arbitration of "questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement." Second, it alleged, as in the 1957 case, that the grievance was arbitrable under subparagraph (3) of Section 10A (R. 4-7).

The Company, in its answer, denied the existence of a past practice and denied that the claim of violation of the agreement was arbitrable (R. 20-22). As an additional defense, the Company alleged that the issue presented in the complaint was identical to the issue which had been presented in the prior litigation, and that therefore any relief on the present complaint was barred (R. 22-24).

Both parties moved for summary judgment. The Union's motion relied exclusively on its first claim, based upon the allegation of violation of the agreement (R. 17). The Com-

pany's motion asked for summary judgment on both claims (R. 24).

The district court granted the Union's motion, denied the Company's motion, and directed the Company to proceed to arbitration of the grievance (R. 42). The court, in a memorandum opinion, said:

> "Plaintiff alleges a violation of the collective bargaining agreement as a result of contracting-out work. The contract provides for arbitration of 'alleged violations of this agreement.' Therefore, under the language of the Supreme Court in *Warrior*, at page 585, this dispute must be submitted to arbitration" (R. 41).

The earlier decision by the court of appeals, the district court held, was inapplicable because it had been decided solely on the basis of Subparagraph (3) of Section 10A, dealing with arbitration of questions involving past practices. Furthermore, that decision was made prior to the Supreme Court's *Warrior* opinion and relied heavily on the decision of the Fifth Circuit in the *Warrior* case which was subsequently reversed (R. 41).

On appeal, the court of appeals reversed the decision of the district court, and remanded the case with directions that the Union's motion for summary judgment be denied and the Company's motion on both claims be granted (R. 53).

Although the court's order disposes of both of the Union's claims, its opinion discusses only the claim that the grievance was arbitrable under subparagraph 1 of the arbitration provision, which provides for arbitration of alleged violations of the agreement. The grievance was not arbitrable under that provision, the court said, because there is no clause in the agreement dealing with contracting out. Pointing out that the Union relied on the recognition clause as the basis for its grievance, the court held that that clause was inapplicable because it made no reference either to arbitration or to the contracting out of work. The court stated that

that clause only required the Company to bargain with the Union on wages, hours and working conditions. Since the Company had bargained on this very grievance, the court concluded that it had fulfilled its obligations under the recognition clause (R. 46-47).

To the Union's argument that this question was for the arbitrator since the Union had alleged that there was a violation of the agreement, and the arbitration clause made arbitrable any questions "involving or arising from applications, interpretations or alleged violations of the terms of this agreement," the court responded that "plaintiff's position is devoid of all logic. It is without merit and we so hold" (R. 48).

The court went on to refer to the bargaining history on the subject of contracting out and concluded that this history fortified its conclusion that the plaintiff's claim was without merit (R. 48-49).

The court then turned to the question raised by the Company's reliance on the prior decision of the court of appeals. It concluded that, although in the first case the Union had relied on the past practice clause while in this case it was relying upon the contract violation clause, the dispute was essentially the same. Ignoring the fact that this was a new and separate grievance arising out of a new fact situation under a new collective agreement, the court said that "the plaintiff in both cases has presented the same claim or demand . . . The only difference is that in the present case it offers in support of its claim a different reason. . . ." The Union, therefore, was barred by the doctrine of collateral estoppel (R. 49-50). The Court summed up its holding in the following words:

> "Thus, we hold (1) that defendant was not obligated by the terms of the agreement to submit the grievance in dispute to arbitration, and (2) even if defendant were so obligated that plaintiff is barred from the maintenance of its present action" (R. 52).

SUMMARY OF ARGUMENT

I

In two cases decided in 1960, *United Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, and *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, this Court held that when a collective bargaining agreement provides for arbitration of all questions involving its interpretation and application, any grievance claiming that the employer has violated the agreement presents an issue to be resolved by arbitration. The Court stressed that the merits of the grievance itself should not be considered in determining whether it is subject to arbitration.

Under those principles, the grievance presented in this case is plainly arbitrable. The agreement provides for arbitration of "alleged violations of the terms of this agreement" and of "alleged noncompliance with past policies, practices, customs or usages relative to working conditions." The Union's grievance falls squarely within both of those provisions, since it claimed both that the Company's action had violated the "recognition clause" of the agreement and that it was contrary to past practice.

In holding to the contrary, the court below made the error of deciding the merits of the grievance, instead of deciding whether it was arbitrable. It concluded that the "recognition clause" only required the Company to bargain with the Union, but did not in any way restrict its right to contract out work.

The court characterized as "devoid of all logic" the contention that the fact that the Union had alleged a violation of the recognition clause was sufficient to make the grievance arbitrable. Yet this argument, which the court below summarily rejected, is precisely what this Court held in *American Manufacturing* and *Warrior & Gulf*.

Although irrelevant, it is noteworthy that the Union's claim that the recognition clause had been violated is not so

far-fetched as the court seemed to think. There is a substantial body of arbitration opinion holding that a recognition clause such as is found in most collective bargaining agreements does imply some limitation on the right of management to reduce the scope of the bargaining unit by contracting out work.

The Company has attempted to distinguish *American Manufacturing* and *Warrior & Gulf* on the ground that the agreement in the present case has a provision stating that matters "not covered in this Agreement" are not subject to arbitration, but that the Union shall have the right to strike over such matters. This language excludes from arbitration any grievance not based on the agreement. For example, a claim that certain contracting out is unfair, even though not in violation of the agreement, would not be subject to arbitration. In this case, however, the Union has claimed rights under the agreement, and that claim is plainly subject to arbitration.

The fact that the Union has the right to strike on matters *not* subject to arbitration is not a basis for construing the provisions which define the matters which *are* subject to arbitration more narrowly than comparable provisions were construed in *American Manufacturing* and *Warrior & Gulf*. Although those cases did involve agreements with absolute no-strike clauses, the principles they established do not depend upon the presence of such a clause. Mr. Justice Brennan's concurring opinion, 363 U. S. at 573, makes that clear, and every court of appeals which has had occasion to pass on the question has so held.

II

The alternative holding of the court below, that its earlier decision in *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (1960) was conclusive as a matter of collateral estoppel on the issues involved in this case, is simply wrong.

First of all, the only issue adjudicated in the earlier case was whether a contracting-out grievance was subject to arbitration under Subparagraph 3 of Section 10A of Article II, which provides for arbitration of alleged violations of past practice. Since the present case involves a wholly different cause of action, the earlier decision cannot be conclusive as to an issue which it did not decide, namely, whether the grievance is subject to arbitration under Subparagraph 1 of Section 10A, which provides for arbitration of alleged violations of the agreement. The court below erred in stating that the present case involves the same "claim or demand" as was involved in the previous case. This case involves an entirely different grievance, involving an entirely different act of contracting out which took place three years after the events which gave rise to the earlier case.

Second, the earlier case was decided before this Court decided *American Manufacturing* and *Warrior & Gulf*, and was based upon an approach to labor arbitration which this Court repudiated in those cases. It is well established that the doctrine of collateral estoppel is not applicable at all "if a change or development in the controlling legal principles" makes the earlier adjudication "obsolete or erroneous, at least for future purposes . . ." *Commissioner* v. *Sunnen*, 333 U. S. 591, 599 (1948). It follows that the doctrine of collateral estoppel cannot be applied in the present case even to the question which was adjudicated in the earlier proceeding.

Third, the principle of collateral estoppel is not applicable here for yet another reason. The present case not only involves a different grievance than was involved in the prior case, but arises under another agreement. It is settled law that a decision on an issue of law in an action based upon one agreement is not binding on the parties in a subsequent action arising under another agreement, even though the language of the two agreements may be identical.

ARGUMENT

I. THE GRIEVANCE IN THIS CASE IS PLAINLY ARBITRABLE UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT.

In three cases decided in 1960—and often referred to as the "Arbitration Trilogy"—this Court established the basic rules to be applied by the federal courts in suits brought under Section 301 to enforce arbitration provisions in collective bargaining agreements. One of those cases, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, dealt with the enforcement of arbitration awards, and is thus not directly in point here. The other two cases, *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, and *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, laid down very clear and specific guidelines for determining when a federal court, in an action under Section 301, should direct arbitration of a grievance arising under a collective bargaining agreement. Briefly stated, those guidelines are as follows:

1. If the agreement provides for arbitration of all questions involving its interpretation and application, any grievance claiming that the employer violated the agreement presents an issue to be resolved by arbitration.

2. The court should not be influenced, in determining whether a grievance is arbitrable, by its own view of the merits of the substantive claim which the grievance asserts.

3. The fact that the specific subject matter of a grievance may not appear to the court to be governed by any substantive provision of the agreement is irrelevant in determining whether the grievance is arbitrable. If the agreement authorizes the arbitrator to interpret and apply the agreement, then it is for him, and not the court, to decide whether or not a particular subject matter is or is not covered by the agreement.

4. In light of the federal policy favoring grievance arbitration, specific exceptions to broad arbitration provisions should be narrowly construed, and doubts should be resolved in favor of coverage.

Applying those principles to the facts of the present case, it is clear that the grievance involved here is subject to arbitration. The agreement provides for arbitration of "questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement" (R. 11). It also provides for arbitration of "questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions" (R. 12). The Union's grievance falls squarely within both of those provisions, since it claimed both that the Company's action had violated the "recognition clause of the applicable agreement" and that it was contrary to "established past practice, policy, custom and usage" (R. 19).

In holding to the contrary, the court below committed precisely the error which this Court warned against in the Trilogy—it decided the merits of the grievance, instead of simply deciding whether the grievance was arbitrable under the agreement. The court itself undertook to interpret, not the arbitration provision of the agreement, but the recognition clause on which the union based its substantive claim.

The court's reasoning was quite simple. It pointed out that the recognition clause merely states that the Company recognizes the Union as bargaining agent and agrees to bargain with it concerning wages, hours, and conditions of employment. It "makes no reference," the court stressed, "either to arbitration or to the contracting out of work." Since the Company had admittedly bargained with the Union about this particular grievance, by processing it through the pre-arbitration steps of the grievance procedure, the court concluded that the Company had done all that the recognition clause required it to do (R. 47).

The court scoffed at the Union's argument that "the mere allegation that the agreement has been violated, *ipso facto*, entitled it to arbitration." It characterized this position as "devoid of all logic" (R. 48). Yet the very argument which the court dismissed so cavalierly is the essence of this Court's decision in *American Manufacturing*:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances, the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> * * *
>
> "The Union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to 'the meaning, interpretation and application' of the collective bargaining agreement. Arbitration should have been ordered. When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." 363 U. S. at 567-69.

The court below was, therefore, clearly in error even if we assume that it was correct in its view that the recognition clause couldn't possibly have any bearing on a grievance protesting the contracting out of work. "The agreement is to submit all grievances to arbitration, not merely those

which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." 363 U. S. at 568.

It is irrelevant, although perhaps noteworthy as illustrating the correctness of this Court's approach in the Trilogy, that the Union's claim in this case is not so far-fetched as the court seemed to think. There is a substantial body of arbitration opinion which holds, contrary to the views of the court below, that a recognition clause such as is involved in this case (and in virtually every collective bargaining agreement) does imply some limitation on the right of management to contract out the work of the unit for which the employer has agreed to recognize the union as bargaining agent. The reasoning normally relied upon by arbitrators is exemplified by a decision of Sylvester Garrett, past president of the National Academy of Arbitrators and Chairman of the Board of Arbitration established under the collective bargaining agreement between the United Steelworkers of America and United States Steel Corporation:

> "The inclusion of given individuals in the bargaining unit is determined, not on the basis of *who they are*, but on the basis of the *kind of jobs* which they happen to fill. In view of the fact that the Union has status as exclusive representative of all incumbents of a given group of jobs, it would appear that recognition of the Union plainly obliges the Company to refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit." *National Tube Co.*, 17 Lab. Arb. 790, 793 (1951) (Emphasis in original)[2]

[2] See also *Celanese Corp. of America*, 35 Lab. Arb. 925, 942-43 (1959) (table of contracting-out cases showing 16 instances in which arbitrators relied on the recognition clause); Crawford, *The Arbitration of Disputes over Subcontracting* (published by the Bureau of National Affairs in Challenges to Arbitration: Proceedings of the Thirteenth Annual Meeting, National Academy of Arbitrators) pp. 51, 67.

Not only do the principles of the Trilogy squarely control this case, but the facts of this case are virtually identical to the facts of *Warrior & Gulf*. In that case, as here, the grievance involved the contracting out of work. In that case, as here, no substantive provision of the agreement expressly restricted the right of management to contract out work. And in that case, as here, the Union had in the past attempted unsuccessfully to negotiate such an express restriction—a fact which was relied on by the Fifth Circuit and the dissenting Justice in this Court in *Warrior & Gulf*, as it was by the court below in the present case. The decision of this Court in *Warrior & Gulf*, therefore, is fully dispositive of the present case as well:

> "The grievance alleged that the contracting out was in violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration.
>
> "The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts." 363 U. S. at 585.

There is another, equally cogent reason why the result in this case is dictated by *American Manufacturing* and *Warrior & Gulf*. In those cases, the agreements provided only that questions of interpretation and application of the agreement were subject to arbitration. The agreement in the present case has such a clause but also has an additional clause providing for arbitration of "questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages." The reasoning of *American*

Manufacturing and *Warrior & Gulf*, would seem equally applicable to this latter provision. If any grievance claiming a violation of the agreement is arbitrable under a clause providing for arbitration of questions of interpretation and application of the agreement, then any grievance claiming a departure from past practice must be arbitrable under a clause providing for arbitration of questions of interpretation and application of past practice. A court's view of the merits is no more a basis for denying arbitration in the one case than in the other. In neither situation is there any reason to assume that the parties intended to submit to arbitration only grievances which a court believes have some merit. And in both situations the federal policy favoring grievance arbitration is applicable.

The Company has attempted to distinguish *American Manufacturing* and *Warrior & Gulf* on the basis of the following language, which is found in Article II, Section 10, Paragraph D of the parties' agreement:

> "The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate." (R. 12).

This language, the Company argues, indicates that the parties intended to exclude certain matters from arbitration. Indeed it does. At one time, the parties had an arbitration procedure which provided for arbitration not only of grievances based on the agreement or past practice, but also of "questions pertaining to rates of pay, wages, hours of em-

ployment, or other conditions of employment *not covered by the contract.*" (R. 35, emphasis added). Under that provision, the Union could, for example, have processed through arbitration a claim that management's decision to contract out certain work was simply "unfair" even though not in violation of the agreement. Under the present language, such a claim can be processed as a grievance, but it is not subject to arbitration.

In the present case, however, the Union is claiming not that management has acted unfairly, but that it is acting contrary to the agreement and past practice. That claim, as we have seen, is plainly subject to arbitration.

The Company has also argued that because the language quoted above gives the Union the right to strike over matters which are *not* subject to arbitration under the agreement, the provisions which define the matters which *are* subject to arbitration should be construed more narrowly than were the comparable provisions in *Warrior & Gulf* and *American Manufacturing*. Underlying this argument is the wholly false assumption that the principles announced in the Trilogy are applicable only to agreements which contain absolute no-strike clauses. The Court in those cases did rely, in part, on the federal policy which favors arbitration as a substitute for the strike. But that policy is obviously just as applicable where the agreement gives the union the choice of striking or arbitrating as it is where the union has given up its right to strike in exchange for arbitration. Mr. Justice Brennan's concurring opinion in *American Manufacturing* and *Warrior & Gulf* makes clear that the principles announced in those cases do not depend upon the presence of a no-strike clause in the agreement 363 U. S. at 573. And every court of appeals which has had occasion to pass on the question has so held. *International Union of Elec. Workers* v. *Westinghouse Elec. Corp.*, 326 F. 2d 758 (2d Cir. 1964), *affirming per curiam* 218 F. Supp. 82 (S.D.N.Y. 1963); *United Steelworkers* v. *General Elec. Co.*, 327 F. 2d 853

(6th Cir., Feb. 19, 1964), *affirming* 211 F. Supp. 562 (N.D. Ohio 1962); *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists,* 304 F. 2d 449 (1st Cir. 1962) (in which precisely the same argument the Company here has made was made in Appellant's Brief).[3] See also *Drake Bakeries Inc.* v. *Local 50, American Bakery Workers,* 370 U. S. 254, 261 n. 7.[4]

Moreover, to the extent that the Company's argument assumes that the Union would have the right to strike over the grievance involved in this case, it begs the very question

---

[3] The employer in that case argued as follows:

"The *Warrior & Gulf* contract contained an 'absolute' no-strike clause in the contract, by which the Union bound itself not to strike over any grievances during the life of the contract . . .

"Here, in sharp contrast, the contract contains an express exception to the no-strike clause, in all cases where the Company denies that a particular grievance presents an arbitrable question. Section 13 of Article XVIII. In other words, the parties here, with respect to disputes not resolved in the grievance procedure, have bargained, not for the absolute *quid pro quo* found in *Warrior & Gulf* (of arbitration in every instance) but for an alternative: if the particular issue, arbitrability of which has been disputed by the Company, is (by reason of its broad scope or significance or otherwise) of sufficient concern to the Union, the Union is given express freedom to use, or threaten the use of, its customary and powerful sanction, the strike. Otherwise stated, the appellant Company has deliberately accepted the risk of a strike in order to protect itself against unwarranted arbitral intrusion into areas of solely management concern. The whole concept and approach to the arbitration clause is completely and significantly different from the *Warrior & Gulf* case." Brief for Appellant, *Westinghouse Elec. Corp.* v. *Local 1790, Int'l Ass'n of Machinists,* 304 F. 2d 449 (1st Cir. 1962). pp. 15-16.

[4] The only decision of which we are aware that seems to hold that the principles of *American Mfg.* and *Warrior & Gulf* are inapplicable where there is a right to strike is *Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 217 F. Supp. 622 (W.D. Pa. 1963). That case, however, seems in conflict with a decision of the Third Circuit in a suit to compel arbitration brought on the same agreement, and involving the same parties, in which the court stated that those principles were controlling. *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 283 F. 2d 93 (3rd Cir. 1960).

which is at issue here. The agreement clearly deprives the Union of the right to strike as to any matter which is subject to arbitration. Thus, if, as we have contended, the grievance involved here is arbitrable, it follows that the Union would not have the right to strike over it.

In short, the language of Article II, Section 10, paragraph D simply has nothing to do with this case. The question here, rather, is whether the grievance is arbitrable under subparagraph (1) of paragraph A, which provides for arbitration of questions involving "alleged violations of the terms of this agreement," and subparagraph (3), which provides for arbitration of questions of "alleged noncompliance with past policies, practices, customs or usages relative to working conditions." Since the grievance alleged both a violation of the agreement and a departure from past practice, it is plainly arbitrable under both of those provisions.

The only remaining question is whether this result, which is required as a matter of contract interpretation, is nevertheless precluded by the doctrine of collateral estoppel. We turn now to an examination of that question.

II. TO THE EXTENT THAT THE COURT BELOW RELIED UPON THE DOCTRINE OF COLLATERAL ESTOPPEL IN SUPPORT OF THE RESULT IT REACHED, ITS DECISION IS CLEARLY ERRONEOUS.

As an alternative basis for its decision, the court below held that its earlier decision in *Independent Petroleum Workers v. Standard Oil Co.*, 275 F. 2d 706 (1960), was conclusive as a matter of "collateral estoppel" on the issues involved in the present case. This aspect of the court's decision is simply wrong, for the following three reasons:

1. The only issue adjudicated in the earlier case was the arbitrability of a contracting-out grievance under Subparagraph (3) of Section 10A of Article II. Since the present case involves a different grievance, and therefore a different

cause of action, the earlier decision cannot be conclusive on an issue which it did not decide—namely the arbitrability of a contracting out grievance under Subparagraph (3).

2. The doctrine of collateral estoppel does not apply where between the first action and the second one, intervening judicial decisions have rendered the first decision obsolete.

3. The present case not only involves a different grievance than was involved in the prior case, but it also arises under a different agreement. It is settled law that a decision on an issue of law in an action based upon one agreement is not binding on the parties in a subsequent action involving another agreement, even though the language of the two agreements may be identical.

All three of these principles are firmly established by this Court's decision in *Commissioner v. Sunnen*, 333 U. S. 591 (1948). The question in that case was whether a taxpayer was liable for income tax on royalties paid by a corporation under several patent licensing agreements between the taxpayer and the corporation. The taxpayer claimed that he was not liable for taxes on these royalties because he had assigned his entire right, title and interest in the licensing agreements to his wife, and the royalties had in fact been paid to her. Moreover, the taxpayer claimed that the Commissioner was barred from asserting these tax claims because, in a prior proceeding, the Board of Tax Appeals had held that the taxpayer was not liable for income tax on the royalties paid to his wife under one of these licensing agreements.

The Court began its opinion by explaining the difference between *res judicata* and collateral estoppel. The former doctrine, the Court said, "applies to repetitious suits involving the same cause of action," and precludes relitigation of any matter which might have been raised in the original proceeding. 333 U. S. at 597. Collateral estoppel, on the other hand, applies "where the second action be-

tween the parties is upon a different cause or demand." In that situation, the Court stated:

> "the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the findings or verdict was rendered.' [citations omitted] *Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time.*" 333 U. S. at 597-98 (emphasis added).

As applied to the present case, this means that—contrary to the holding of the court below—the earlier decision that a contracting-out grievance was not arbitrable under subparagraph 3 (the "past practice" provision) could not in any event bar a subsequent claim for arbitration of another grievance under subparagraph 1 (the "contract violation" provision) since the latter claim, while "it might have been tendered and decided" in the first case, was "not in issue in the first proceeding."[3]

---

[3] This principle was recognized by this Court as early as 1877 in *Cromwell* v. *County of Sac*, 94 U. S. 351, 353:

> "But where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict, was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action."

See also *Restatement, Judgments* § 70 Comment c (1943): "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of law not litigated in the first action."

The court below, although it used the term "collateral estoppel," actually applied the principle of *res judicata*, on the apparent theory that the present action was based on the same cause of action as was involved in the earlier one. That is simply not the case. The earlier action sought to compel the Company to arbitrate a grievance which protested the contracting out of certain work connected with the erection and dismantling of a scaffold and the stucco finishing of a garage, 275 F. 2d at 709. This work was performed in 1957. The present action seeks to compel the Company to arbitrate an entirely different contracting-out dispute, involving the performance of certain crane operating work which took place in 1960. The statement of the court below that "plaintiff in both cases has presented the same claim or demand, that is, that defendant be required to arbitrate the dispute in question" (R. 50), ignores the fact that the two cases involved entirely different disputes. The two causes of action are as different as two negligence actions arising out of different automobile accidents involving the same parties.

It is thus plain that the doctrine of collateral estoppel, as restated in *Sunnen*, establishes that the prior decision cannot bar arbitration under subparagraph 1, since the right to arbitration under that provision was not adjudicated in the prior case. In any event, the other principles established by *Sunnen*, make clear that the doctrine of collateral estoppel is not applicable to any of the issues involved in the present case.

After setting out the general rule of collateral estoppel, the Court in *Sunnen* went on to explain that that rule is is not always applicable even to questions which have previously been adjudicated in prior actions between the same parties. Specifically, it is not to be applied if "a change or development in the controlling legal principles" makes the earlier determination "obsolete or erroneous, at least for future purposes . . ."

> "That principal is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time . . ." 333 U. S. at 599.

The Court expressly stated that one type of intervening change which can make the doctrine of collateral estoppel inapplicable is "a modification or growth in legal principles as enunciated in intervening decisions of this Court . . ." 333 U. S. at 591.

Accordingly, even if the principle of collateral estoppel might otherwise be applicable in the present case, the fact that this Court's decisions in *American Manufacturing* and *Warrior & Gulf* were rendered subsequent to the earlier decision of the Court below, and totally undercut the basis on which that earlier decision was rendered, means that the parties are not bound to the obsolete principles of law relied on in the earlier case.[8] As the District Court in the present case stated, "Had *Warrior* been decided prior to *Independent Petroleum Workers* v. *Standard Oil Co.*, I think the outcome would have been different" (R. 41).

Finally, the Court in *Sunnen* ponted out that the earlier proceeding had involved royalty payments under only one licensing agreement executed in 1928, while the pending case involved payments under several other, though essentially identical, licensing agreements as well. Even though the issues raised under all of the licensing agreements were identical, the Court held that the doctrine of collateral estoppel, if applicable at all, could apply only to the taxability of the payments made under the particular agreement involved in the earlier proceedings:

[8] See also *State Farm Mutual Ins. Co.* v. *Duel*, 324 U. S. 154, 162 (1945); *Restatement, Judgments* § 70 Comment f. (1943).

". . . if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result or, if consistency in decision is considered just and desirable reliance may be placed upon the ordinary rule of *stare decisis*. Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matters raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment. . . .

"It is readily apparent in this case that the royalty payments growing out of the license contracts which were not involved in the earlier action before the Board of Tax Appeals and which concerned different tax years are free from the effects of the collateral estoppel doctrine. That is true even though these contracts are identical in all important respects with the 1928 contract, the only one that was before the Board, and even though the issue as to those contracts is the same as that raised by the 1928 contract. . . ." 333 U. S. at 600-602.

Accordingly, the doctrine of collateral estoppel cannot apply in the present case at all for the simple reason that the present action arises under a different collective bargaining agreement than was involved in the earlier decision.[7]

[7] See also *Restatement, Judgments* § 70, Comments b, e (1942); Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 7 (1942); Note, 55 Harv. L. Rev. 120, 121 (1941). *Cf. Tioga R.R. v. Blossburg*

The earlier case can therefore be relied on only as precedent, and its value as precedent is nil because of the subsequent contrary decisions of this Court.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed.

Respectfully submitted,

WILLIAM BELSHAW
BENEDICT R. DANKO
1450 119th Street
Whiting, Indiana 46394

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Petitioner

& Corning R.R., 20 Wall. 247 (1874) (holding that an issue of contract interpretation previously decided "cannot be litigated again on the same contract").

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 55

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,

Petitioner,

vs.

AMERICAN OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

RICHARD P. TINKHAM,
DANIEL F. KELLY,
ALLEN W. TEAGLE,
708 Calumet Building,
Hammond, Indiana 46320,

DONALD L. HASTINGS,
910 South Michigan Avenue,
Chicago, Illinois 60680,

FREDERIC D. ANDERSON,
JERRY P. BELKNAP
JAMES E. HULLS,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Attorneys for Respondent.

TINKHAM, BECKMAN, KELLY AND SINGLETON,
Hammond, Indiana 46320,

BARNES, HICKAM, PANTZER & BOYD,
Indianapolis, Indiana 46204,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

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Petitioner,

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT

Respondent accepts Petitioner's statements of "Opinions Below," "Jurisdiction" and "Statute Involved."

Respondent is dissatisfied with Petitioner's statement of the questions presented for review and statement of the case and, therefore, restates them as follows:

QUESTIONS PRESENTED.

Under a collective bargaining agreement containing lengthy and specific provisions limiting the questions which may be referred to arbitration, including, as one of them, that the questions "shall be limited to questions directly

involving or arising from applications, interpretations or alleged violations of the terms of this agreement," and including, as another of them, the provision that "each party shall have the right to refuse to arbitrate" "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement," a union seeks arbitration of a claim that the employer, by contracting out certain work, violated the contract provision that "the company recognizes the union as the sole and exclusive bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees." The questions presented for review are:

1. Did the Court of Appeals exceed the limits of the judicial function or misinterpret the agreement, (a) by holding that the Company had not promised to submit that grievance to arbitration and (b) by rejecting the argument that the mere fact that a party claims a violation entitles it, under the terms of this particular agreement, to arbitration?

2. Where the same contract provisions have already been adjudicated in a prior case between the same parties and involving the same type of grievance, can the binding effect of that adjudication be avoided on the ground that (a) the provisions are embodied in a successor bargaining agreement which is a mere continuation of the earlier agreement, or (b) the losing party has developed a variant argument on which to make its contention, or (c) the losing party can point to an intervening decision of this Court on the general subject in a case which was pending on grant of certiorari at the time of the prior decision, but which the losing party did not regard as significant enough to justify the filing of a petition for certiorari in its own case at that time?

STATEMENT OF THE CASE

This is an action by the Union[1] to compel the Company[1] to arbitrate a grievance.

The grievance was filed October 25, 1960. (R. 19.) It was filed under an agreement executed August 10, 1960, to extend indefinitely a collective bargaining agreement executed August 27, 1959, the term of which otherwise would have expired August 14, 1960. (R. 26.)

Article II of that agreement (R. 9) established a "Grievance Procedure" covering all "questions upon which employees * * * desire consideration * * *." The first five sections of Article II provide for negotiations of the question between Union and Company representatives at ascending levels of authority. Section 9 provides that if the question is not settled as a result of negotiation either party may refer the subject for arbitration. (R. 10-11.)

Section 10 of Article II provides:

> "*Section 10.* As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration shall be limited to:
>
> "1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.
>
> "2. Questions directly involving or arising from applications, interpretations, or alleged violations of the terms of arbitration awards and written agreements not incorporated in this Agreement.
>
> "3. Questions of applications or interpretations of or alleged noncompliance with

1. The parties are herein referred to as the "Union" and the "Company" as in Petitioner's brief at page 3.

past policies, practices, customs or usages relative to working conditions, and grievances arising from:

"(a) the modification by the Company of any of said policies, practices, customs and usages, or

"(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or

"(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement.

* * * * *

"D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate." (R. 11-12.)

On October 17, 1960, the Company contracted-out certain crane-operating work. (R. 30.) On October 25, 1960, the Union filed a grievance alleging that the Company's action violated the recognition clause of the Agreement and past practice:

"The Board of Directors of the IPWA requests that, as required by the recognition clause of the applicable agreement and established past practice, policy, custom and usage, employees of the crane department be assigned and perform all crane operating work, as established by such past policy, practice,

> custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work, be compensated by the appropriate rate for all time and pay so lost." (R. 19.)

The parties negotiated with respect to the questions presented by the grievance at each step of the grievance procedure. The questions were not settled as a result of those negotiations and the Union requested arbitration on February 2, 1961. The Company refused on February 9, 1961. (R. 20.) The present action was instituted on June 2, 1961. (R. 1.)

The Prior Litigation.

There was prior litigation between the parties. Because of it the Court of Appeals applied the doctrine of collateral estoppel as an alternative ground for holding for the Company in the present case.[2]

In October 1957 the Company contracted out some work of repairing and refinishing stucco walls. The Union filed a grievance which read as follows:

> "The Board of Directors of the Independent Petroleum Workers of America requests that as required by the recognition clause of the applicable agreement and established past policy, practice, custom and usage, employees classified as Cement Finishers be assigned and perform all cement finishing work, as established by such past policy, practice, custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work be compensated by the

2. The facts concerning the prior litigation are set forth in the Opinion of the Court of Appeals in *Independent Petroleum Workers v. Standard Oil Company*, 275 F. 2d 706 (7th Cir. 1960), which is reprinted in Appendix C to the Petition for *Certiorari*.

appropriate rate for all time and pay so lost." (275 F. 2d 706 at 709; Appendix C to Petition for Certiorari, pages 38-39.)

Except for the different job title, the grievance is verbatim the same as that filed in the present case.

This was done under the collective bargaining agreement of March 8, 1957. (R. 29.) That was the agreement immediately preceding the agreement of August 27, 1959, which in turn was extended by the agreement of August 10, 1960, under which the present grievance was filed. (R. 26 and 29.)

That agreement, including the grievance and arbitration provisions and the limitations thereon, was the same as the one involved in the present case. (R. 49.)

In that prior case the grievance was processed; it was not settled; the Union sought to arbitrate; and the Company refused. The Union filed an action under § 301 to compel arbitration.

In that litigation the Union relied upon subparagraph (3) of § 10A of Article II of the agreement which provides that "Questions which may be referred to arbitration shall be limited to: * * * (3) questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions * * *."

The District Court refused to order arbitration. *Independent Petroleum Workers* v. *Standard Oil Co.* (N.D. Ind. 1959), 44 LRRM 2676. The Court of Appeals for the Seventh Circuit affirmed. *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (repriated in Appendix C of the Petition for Certiorari.)

In reaching its conclusion, the Court of Appeals said:

"Since *Textile Workers Union of America* v. *Lincoln Mills*, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, the

district courts are empowered under § 301 of the Labor-Management Relations Act, 29 U. S. C. A. § 185 to decree specific performance of an agreement to arbitrate a grievance dispute. *Brass and Copper Workers Federal Labor Union etc. v. American Brass Company*, 7 Cir., 272 F. 2d 849. But since arbitration is voluntary and consensual in nature, warrant therefor must be found within the terms and conditions of the bargaining agreement. *Local 1912, International Association of Machinists v. United States Potash Company*, 10 Cir., 270 F. 2d 496." (275 F. 2d 706 at 709.)

"The trial judge did not err in refusing to order the defendant to submit the grievances relating to the maintenance and repair work to arbitration. The defendant had not contracted to refer the issue to arbitration. It is only where such a contract has been made and the promise broken that the court will order arbitration. *Local No. 149 of American Federation of Technical Engineers (AFL) v. General Electric Company*, 1 Cir., 250 F. 2d 922, certiorari denied 356 U. S. 938, 78 S. Ct. 780, 2 L. Ed. 2d 813." (275 F. 2d 706 at 710.)

In reaching its conclusion, the Court of Appeals did not decide whether or not the grievance itself had merit. On the contrary, it concerned itself solely with interpretation of the arbitration provisions of the contract, to determine whether or not they contained a promise to arbitrate with respect to this subject matter. "The defendant had not contracted to refer the issue to arbitration. It is only when such a contract has been made and the promise broken that the court will order arbitration." (275 F. 2d 706 at 710.) It referred to the negotiating history and past practice solely to determine that question.

The Court of Appeals' decision issued on March 2, 1960. (R. 31.) This Court had already granted certiorari in the *American Manufacturing Co.* case on November 9, 1959

(361 U. S. 881) and in the *Warrior & Gulf Navigation Co.* case on December 7, 1959 (361 U. S. 912). Yet the Union made no effort to bring that case to this Court on certiorari.

The Proceedings in the Present Case.

The crane work involved in the present case was contracted out on October 17, 1960. (R. 30.) This was during the term of the agreement of August 10, 1960, by which the parties had extended the collective bargaining agreement of August 27, 1959.[3] The agreement of August 10, 1960, was negotiated after the Court of Appeals had adjudicated the meaning of the arbitration language in the prior litigation, and the Union had elected not to seek review of that adjudication in this Court.

The Union's grievance was, except for the job description, verbatim the same as its grievance in the prior litigation. (R. 19 and 275 F. 2d 706 at 709.) It was dated October 25, 1960.

The Union's complaint was filed June 2, 1961 (R. 1) and its amended complaint was filed October 5, 1962. (R. 4.) It was in two legal paragraphs. Legal Paragraph I (R. 4-6) claimed that the Union was entitled to arbitrate the contracting out grievance under Article II, § 10A(1) which provides:

> "As a specific limitation on the foregoing Section 3 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration shall be limited to:
>
> "1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement." (R. 11.)

3. Petitioner's statement, on page 3 of its brief, that the case arises under the agreement executed on August 27, 1959, is incorrect, since that agreement expired by its terms on August 24, 1960. (R. 26.)

Legal Paragraph II of the complaint (R. 6-7) contended that the grievance was arbitrable under Article II, § 10A(3) of the agreement which provides:

> "As a specific limitation on the foregoing, Section 9 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration shall be limited to:
>
> * * * * *
>
> "3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, * * *." (R. 11-12.)

The Company, in its answer, in addition to denying the existence and violation of the obligations to arbitrate, as alleged in the complaint, and the existence of the alleged past practice, asserted, as a third defense, that the cause of action had been fully adjudicated in the prior litigation and that the Union had been granted a full and complete opportunity to present its claim against the Company in the former action. (R. 20-24.)

The Union moved for summary judgment solely with respect to Legal Paragraph I of its complaint. It never moved, or otherwise sought judgment in its favor, with respect to Legal Paragraph II. (R. 17.)

The Company moved for summary judgment on plaintiff's amended complaint in two paragraphs. (R. 24.)

The District Court denied defendant's motions for summary judgment as to paragraphs I and II of the amended complaint (R. 38), and granted the plaintiff's motion for summary judgment as to paragraph I of the amended complaint only. The District Court ordered paragraph II of the amended complaint dismissed. (R. 38.)

The Union never filed any appeal or cross-appeal from

the order of the District Court in dismissing Legal Paragraph II of the amended complaint. The Union did not urge in the Court of Appeals that it was entitled to arbitrate the grievance under Article II, § 10A(3), relating to past practices, which had been the subject matter of Legal Paragraph II of the amended complaint. It relied solely upon Article II, § 10A(1) relating to "alleged violations of the terms of this agreement," which was the subject matter of Legal Paragraph I of the amended complaint. The Court of Appeals said, in a footnote to its opinion:

> "The complaint contained two Legal Paragraphs but plaintiff in the District Court, as well as here, relies only upon Legal Paragraph I. It was upon this Paragraph that the District Court granted the relief sought." (R. 45.)

The opinion of the Court of Appeals, accordingly, does not deal with Legal Paragraph II.

On appeal, the Court of Appeals reversed the decision of the District Court and remanded the case to the District Court "with directions that plaintiff's motion for summary judgment be denied and defendant's motion allowed, in accordance with the opinion of this Court filed this day." (R. 53.)[4]

The Court of Appeals did not purport to deal with the merits of the alleged grievance.

> "Regardless of the approach, the question for decision remains as to whether the parties have obligated themselves by contract to submit the grievance in dispute to arbitration. Plaintiff recognizes this by its

4. Petitioner's statement, on page 8 of its brief, that the Court of Appeals remanded with directions that "the Company's motion on *both* claims be granted" (emphasis supplied) is mistaken. The judgment of the Court of Appeals does not so say. (R. 53.) Its opinion does not deal with Legal Paragraph II, except to say that it was not before it. (R. 44-45.) Legal Paragraph II has not been in this case since the District Court dismissed it (R. 38) and no appeal from that dismissal was taken.

> statement of the contested issue, as well as at other places in its brief. At one point it states, 'There is only the issue of the agreement— or non-agreement— of the parties to arbitrate.' At another point it asks, 'Did the parties agree to resolve by arbitration the violation of the agreement alleged by one of the parties?' " (R. 46.)

The Court, in examining and interpreting the particular promises with respect to arbitration, including the expressed limitations thereon in § 10A(1) and § 10D, found that they did not contain a promise by the Company to arbitrate every allegation by the Union that the Company had violated the contract. The Court said that this was the plaintiff's position as to the meaning of the arbitration limitations in this particular contract. It was as to this that the Court said: "Plaintiff's position is devoid of all logic. It is without merit and we so hold." (R. 48.)

The Court referred to the bargaining history relative to the right to contract out work, which it said "is much discussed in the briefs." (R. 48.) The Court held that it was not controlling, but that it fortified the conclusion which the Court had reached that there was no merit to the plaintiff's claim that the contract contained a promise to arbitrate every alleged violation.

The Court then turned to the question of collateral estoppel. It pointed out that the two cases involved the same parties with the same attorneys; collective bargaining agreements which were the same, including the provision for arbitration with the limitations thereon; contested issues which were the same, i.e., "whether the defendant agreed to arbitrate its right to contract out work"; and prayers for relief which were exactly the same. (R. 49-50.) The Court said: "* * * plaintiff in both cases has presented the same claim or demand, that is, that defendant be required to arbitrate the dispute in question. The only dif-

ference is that in the present case it offers in support of its claim a different reason from that relied upon in the previous case." (R. 50.)[5]

5. Petitioner's brief mistakenly asserts that the Court was "ignoring the fact that this was a new and separate grievance arising out of a new fact situation under a new collective bargaining agreement." (Brief for Petitioner, p. 9.) The Court of Appeals, in its opinion, reflects its awareness of the fact that the merits of the grievances might be different; but it did not feel that it was the Court's function to pass upon the merits of the grievances. It dealt rather with whether the identical language of promise and limitation with respect to arbitration, continued from the previous collective bargaining agreement, when applied to a grievance phrased in the identical terms, had a meaning different than that adjudicated between the same parties in the previous case.

SUMMARY OF ARGUMENT.

I.

The Court of Appeals followed faithfully the principles laid down by this Court in the *Steelworkers Trilogy* and the subsequent cases.[6]

The Court said: "• • • the question for decision remains as to whether the parties have obligated themselves by contract to submit the grievance in dispute to arbitration." (R. 46.) It decided only that issue. (R. 52.) It did not purport to decide the merits of the Union's claim.

Because the Court was construing an arbitration provision made up principally of "specific limitations" and exclusions which cover a page and a half of the record (R. 11-12) and because the meaning of the language of limitation and exclusion was in dispute, the Court applied the usual methods of contract interpretation to determine the scope and meaning of the promise.

II.

The contract provides in Article II, sections 1 through 5, a broad grievance procedure and, in Section 9, for arbitration.

Section 10 of Article II is a long and detailed one, and is phrased entirely in terms of limitation and exclusion. The parties thus expressed a paramount intention that

6. *United Steelworkers* v. *Warrior & Gulf Nav. Co.* (1960), 363 U. S. 574;
United Steelworkers v. *American Mfg. Co.* (1960), 363 U. S. 564;
Atkinson v. *Sinclair Refining Co.* (1961), 370 U. S. 238;
Drake Bakeries v. *Bakery Workers* (1961), 370 U. S. 254;
John Wiley & Sons v. *Livingston* (1964), 376 U. S. 543.

their promise to arbitrate be a limited one. The scope of the Court's inquiry was, therefore, broader than in cases where the promise to arbitrate contains no language of exclusion, or only vague or limited language.[7]

The Union in its amended complaint originally claimed the right to arbitrate under both Part A(1) relating to contract violations and under part A(3) relating to noncompliance with past practice. Legal Paragraph II of its amended complaint was dismissed by the District Court; no appeal was taken and the question was not urged or dealt with in the Court of Appeals. In the Court of Appeals, and here, the only claim of arbitrability in issue is that founded upon part A(1).

Therefore, the question before the Court was whether the Company had promised to arbitrate a claim that it violated Article I by contracting out some work. The Court properly found that it did not, by examining the promise to arbitrate and the limitations and exclusions from that promise, contained in the contract. That is the exact function of the Court as laid down by this Court in its decisions cited above. The Court of Appeals performed that function in the way which this Court has prescribed.

Part A(1) limits arbitration to questions *directly* arising from applications, interpretations, or alleged violations *of the terms of this agreement*. The Court, therefore, was required to determine, and did determine, whether there was a term of the agreement dealing with the subject of contracting out work. It did not seek to determine the merits of the grievance. That is, it did not seek to determine whether the agreement prohibited contracting out work, for to do so would be to deal with the merits. It determined only whether the subject of contracting out work was a "term of this agreement."

7. *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564 at 572.

Part D provides that "Each party shall have the right to refuse to arbitrate" "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement."

This is the other side of the same limitation which appears in Part A(1). The Court had to determine whether contracting out work was one of the matters "which are not covered in this agreement" because the parties had expressly agreed that if it was, "each party shall have the right to refuse to arbitrate any such matter."

Since the Union contended solely that the matter was covered in Article I, § 1, the Court had only to look there to see whether the subject of contracting out work was or was not covered.

Article I says the following, and only the following:

> "The Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company [in the appropriate bargaining unit]." (R. 8.)

Contracting out is not mentioned. It cannot be argued that somehow contracting out of work becomes a term of Article I, § 1, because it is somehow encompassed within the phrase "rates of pay, wages, hours of employment, and other conditions of employment." For part D of § 35 expressly says that there are "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement." As to those "each party shall have the right to refuse to arbitrate."

The Court looked at the bargaining history in an effort to determine whether contracting out work was one of the "matters * * * not covered by this agreement" or whether

it was one of the "terms of this agreement." It found that this history, "while of course not controlling fortifies the conclusion which we have reached that plaintiff's claim is without merit."

The contract at bar contains a limited no-strike clause. The Court of Appeals did not treat this as controlling. But in *American Manufacturing* and *Warrior & Gulf* this Court did treat the presence of a flat no-strike clause as an aid in interpreting the arbitration clause and finding it to be equally broad.

There had been prior litigation between the same parties. It related to a grievance identical in language except for a different job title. In it the Union claimed the right to arbitrate under identical contract provisions. The Court of Appeals determined that this contract language did not contain a promise by the Company to arbitrate the matter of contracting out work. Five months later, with that adjudicated meaning of this language before them, the parties entered into an agreement extending their contract with that same language. The meaning which the parties intended by the language to which they then agreed, could not have been different from the meaning which it had been adjudicated to have. The present grievance was filed under that contract.

Plainly the Company has not agreed to submit this dispute to arbitration. The Court of Appeals properly so held.

III.

The collateral estoppel rule is particularly applicable to an action such as this involving the interpretation of a contract as between the parties of the contract themselves and involving personal relations under the law of private contracts rather than governmental relations to its citizens under public law.

The collective bargaining agreement here involved is a renewal and continuation of the agreement involved in the prior case between these same parties. It carried over the same contract terms, including the identical arbitration provisions with the limitations thereon. The interpretation of the same contract provisions in the prior case is, therefore, binding in this case, especially since, after that adjudication, the Union not only did *not* seek any amendment of the agreement to conform to the interpretation it had urged, but it voluntarily agreed to extend the agreement with the same adjudicated provisions, and filed the present grievance during the period of the extension. This facet of the collateral estoppel rule has special force in collective bargaining agreements in view of the necessity of continuity of such contractual relationship and the concept of voluntary agreement as a basis of labor relations.

The issue of the arbitrability of a contracting-out grievance under the same contract provisions was determined in the prior case. An issue cannot be split into pieces; once determined, it is binding on the parties even though the loser may later conceive some grounds or reasons different from those it previously urged. The estoppel extends to every matter which was or might have been urged to sustain or defeat the determination made. The Union's current argument under Article II, Section 10(A)(1) is merely another reason in support of its position on the issue of arbitrability of the grievance and comes too late. Likewise, the fact that a different grievance is involved is immaterial. The contract has been construed and that construction is conclusive on other grievances of the same character and subject matter so long as the contract provisions remain the same.

The interpretation of a contract is essentially a question of fact, not of law, and, accordingly, the issue of contract interpretation in the prior case is the kind to which the

collateral estoppel rule applies with special force. While the Steelworkers Trilogy and other decisions of this Court have come down since the decision in the prior case, they mark no decisive change in the law, but are, rather, examples of the orderly development of legal principles in the way common to our jurisprudence. The collateral estoppel rule cannot be avoided on intervening events of this character. The argument that the prior decision is demonstrably bad because of a citation to a court of appeals' decision reversed in the Trilogy falls flat in view of the fact that all the Trilogy cases were pending in this Court on grant of certiorari at the time of the prior decision, but the Union did not regard that as sufficiently significant to warrant applying to this Court for a writ of certiorari. At the least, therefore, the case falls within the rule that where a question has been distinctly adjudged in one action, it cannot be disputed in a subsequent action even if the determination had been reached on an erroneous view or erroneous application of the law.

ARGUMENT.

I. THE ISSUE IS WHETHER THE COMPANY PROMISED TO ARBITRATE THIS GRIEVANCE.

There are only two issues in this case. The first is whether the Company promised to arbitrate the particular grievance. The second is whether the plaintiff's claim had been so litigated and determined in the prior case that it is not entitled to litigate it again. Parts I and II of the brief deal with the first question.

Where a union seeks an order compelling a company to arbitrate a grievance, this Court has stated plainly the function which the lower court is required to perform, and the limitations on that function.

This Court has said that there is no obligation to arbitrate unless the employer has promised to do so, and that the scope of the obligation does not exceed the scope of the promise. Therefore, this Court has said that it is the duty of the court to determine what promise was made.

This Court so said in *United Steelworkers* v. *Warrior & Gulf Nav. Co.* (1960), 363 U. S. 574:

> "The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (363 U. S. 574 at 582.)

This Court said the same thing in *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564; *Atkinson* v. *Sinclair Refining Co.* (1961), 370 U. S. 238, 241; and *Drake Bakeries* v. *Bakery Workers* (1961), 370 U. S. 254, 256. This Court has restated the rule in clear and simple terms

as recently as March 1964 in *John Wiley & Sons* v. *Livingston* (1964), 376 U. S. 543, where it said:

> "'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.' *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 341. Accord, e.g., *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582. The problem in those cases was whether an employer, concededly party to and bound by a contract which contained an arbitration provision, had agreed to arbitrate disputes of a particular kind. Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all by the agreement's arbitration provision. The reason requiring the courts to determine the issue is the same in both situations. The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all."

This Court has also held that the courts must not decide the grievance, but only whether the company has agreed to arbitrate the grievance. Thus where the company had agreed to arbitrate a particular kind of question, the court must order it to arbitrate even if the court found the particular grievance to be "a frivolous, patently baseless one." *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564 at 566. The Court thus rejected the *Cutler-Hammer* doctrine which was then law in New York.[8] This

8. *International Association of Machinists* v. *Cutler-Hammer, Inc.* (1947), 271 App. Div. 917, 67 N. Y. S. 2d 317, affirmed 297 N. Y. 519, 74 N. E. 2d 464, disapproved in *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564 at 567.

Court reasoned that, where the parties had agreed to have the merits determined by the arbitrator, they were entitled to do so no matter how obvious and inevitable his answer would be.

This principle is limited only by the requirement that "the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." *John Wiley & Sons v. Livingston* (1964), 376 U. S. 543 at 555.

This Court has also made it plain that, in deciding whether the Company has promised to arbitrate, the courts must look at the language of the contract taken as a whole, and interpret it by the same means by which contracts generally are interpreted. Thus in *United Steelworkers v. Warrior & Gulf Co.* (1960), 363 U. S. 574, the Court looked not merely at the promise to arbitrate, but at other language which was claimed to be an exception to it. The Court also looked at the scope of the no-strike clause. It interpreted the phrase "strictly a function of management," saying that it "must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion." (376 U. S. 574 at 584.) It treated the scope of the no-strike clause as an aid to determining the meaning of the parties as to the scope of the arbitration clause. (363 U. S. 574 at 583.)

In *United Steelworkers v. American Mfg. Co.* (1960), 363 U. S. 564, the Court, in determining whether the Company promised to arbitrate the particular grievance, found it relevant to examine the no-strike clause, the details of the grievance procedure, the management rights clause, and the seniority provisions. (363 U. S. 564 at 565-566.)

In his concurring opinion Mr. Justice Brennan pointed out that other promises contained in the agreement may be

relevant to the interpretation of the arbitration promise. And he said that the meaning of the arbitration promise is not to be found simply in the dictionary definitions of its words, but by reference to the background which gave rise to their inclusion:

> "And I emphasize this, for the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreement. The meaning of the arbitration promise is not to be found simply by reference to the dictionary definitions of the words the parties use, or by reference to the interpretation of commercial arbitration clauses. *Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion.* The Court therefore avoids the prescription of inflexible rules for the enforcement of arbitration promises. Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause—considerations of the milieu in which the clause is negotiated and of the national labor policy." *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564 at 570. (Emphasis added.)

It is settled that where the arbitration promise excludes a particular area from arbitration, this broadens still further the scope of the Court's inquiry:

> "The issue in the *Warrior* case is essentially no different from that in *American*, that is, it is whether the company agreed to arbitrate a particular grievance. In contrast to *American*, however, the arbitration promise here excludes a particular area from arbitration: 'matters which are strictly a function of management.' *Because the arbitration promise is different, the scope of the court's inquiry may be broader.* Here, a court may be required to examine the substantive

> provisions of the contract to ascertain whether the parties have provided that contracting out shall be a 'function of management.'" Mr. Justice Brennan, concurring, *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564 at 571-572. (Emphasis added.)

The Court of Appeals here followed these principles faithfully. It stated only one issue. "Regardless of the approach, the question for decision remains as to whether the parties have obligated themselves by contract to submit the grievance in dispute to arbitration." (R. 46.) It decided only that issue. "Thus, we hold (1) that defendant was not obligated by the terms of the agreement to submit the grievance in dispute to arbitration." (R. 52.) It did not purport to decide the merits of the Union's claim. Because it was construing an arbitration provision filled with language of exclusion and limitation, the meaning of which was in dispute, it applied the usual methods of contract interpretation to determine the scope and meaning of the promise.

II. THE COMPANY DID NOT PROMISE TO ARBITRATE THIS GRIEVANCE.

The contract contains in Article II, in Sections 1 through 5, a procedure by which "questions upon which employees * * * desire consideration" may be the subject of "negotiations" at ascending levels of management and union authority. (R. 9-10.) The contract uniformly uses the term "question" rather than the term "grievance." It is not believed that that locution makes any difference.

Article II, § 9, provides that "If the question is not settled" at the manager level "the Company or the Union may refer the subject for arbitration." It provides how the arbitrator shall be selected and paid and makes his decision

9. Apart from the collateral estoppel question.

"final and binding on both the Company and the Union." (R. 10-11.)

Section 10 of Article II is a long and detailed one, and is phrased entirely in terms of limitation and exclusion. It begins: "As a specific limitation on the foregoing Section 9 of this Article II." Under it part A begins: "Questions which may be referred to arbitration shall be limited to." Part D describes certain matters and says explicitly "Each party shall have the right to refuse to arbitrate any such matter."

In *United Steelworkers* v. *Warrior & Gulf Nav. Co.* (1960), 363 U. S. 574, the exclusion only of "matters which are strictly a function of management" was enough to cause Mr. Justice Brennan to say:

> "In contrast to *American*, however, the arbitration promise here excludes a particular area from arbitration—'matters which are strictly a function of management.' Because the arbitration promise is different, the scope of the court's inquiry may be broader. Here, a court may be required to examine the substantive provisions of the contract to ascertain whether the parties have provided that contracting out shall be a 'function of management.'" (363 U. S. at 572.)

In the present case the contract language of limitation and exclusion occupies a page and a half of the printed transcript of the record. (R. 11-12.) The parties amply demonstrated their intention that their promise to arbitrate was a limited one, and that the limitations were the essence of the promise. If the "scope of the court's inquiry may be broader" because of the brief exclusion clause in *Warrior*, the Court cannot properly give less attention to the limitations upon the parties' promise in this case than the parties themselves did in their contract.

There are two layers of exclusions in the contract at bar. One layer appears in part A of § 10. The other layer

appears in part D. (R. 11-12.) Part A limits the questions which are arbitrable to three numbered kinds. Part D affirmatively gives each party "the right to refuse to arbitrate" certain described matters.

The Union originally sought to arbitrate questions which it claimed were within the limitations of part A(1) and part A(3) of § 10. The question under part A(1) involved a claim that by contracting out some work the Company had violated its recognition of the Union contained in Article I. (R. 9.) The question under part A(3) involved a claim that by contracting out some work the Company failed to comply with a policy, practice, custom or usage.

When the Company refused to arbitrate, the Union filed a complaint in two Legal Paragraphs. By Legal Paragraph I it sought to compel the Company to arbitrate the first question, which it claimed to be within the limitations of part A(1). By Legal Paragraph II it sought to compel the Company to arbitrate the second question which it claimed to be within the limitations of part A(3). (R. 4-7.)

The Union moved for summary judgment solely with respect to Legal Paragraph I. (R. 17.) It never sought judgment in its favor with respect to Legal Paragraph II. The District Court dismissed Legal Paragraph II. (R. 38.) The Union never sought to appeal from this order. It did not urge in the Court of Appeals the question covered by Legal Paragraph II, which in that paragraph it had claimed to be within the limitation of part A(3). It relied solely on the question which it claimed to be within the limitation of part A(1), and which it sought to compel the Company to arbitrate in Legal Paragraph I of its complaint. That is the only question the arbitrability of which is before this Court.[10]

Therefore, the question before the Court was whether

10. See the fuller description of the procedural background in the Statement of the Case, pages 8 to 10.

the Company had promised to arbitrate a claim that it violated Article I by contracting out some work.

The Court properly found that it did not, by examining the promise to arbitrate and the limitations and exclusions from that promise, contained in the contract.

There is both a limitation and an exclusion in the contract which exclude this particular area from arbitration.

The limitation is to be found in § 10A(1), the very part upon which the Union founds its claim.

> "Section 10. *As a specific limitation* on the foregoing Section 9 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration *shall be limited to:*
>
> "1. Questions *directly* involving or arising from applications, interpretations or alleged violations *of the terms* of this agreement." (R. 11). (Emphasis added.)

The specific exclusion is to be found in § 10D. It reads as follows:

> "Section 10. *As a specific limitation* on the foregoing Section 9 of this Article II, the following shall be effective:
>
> "D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but *each party shall have the right to refuse to arbitrate any such matter.* In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but, solely with respect to the issue concerning *which either party shall have so refused to arbitrate.*" (R. 11-12) (Emphasis added.)

It is apparent that this is not a case with a broad arbitration provision such as that in *United Steelworkers* v. *American Mfg. Company* (1960), 363 U. S. 564, which contained no exclusion clause. It is not even a contract provision like the one in *United Steelworkers* v. *Warrior & Gulf Nav. Co.* (1960), 363 U. S. 574, which excluded only "matters which are strictly a function of management." It cannot be said here, as Mr. Justice Brennan said in *Warrior*, that "The very ambiguity of the *Warrior* exclusion clause suggests that the parties were generally more concerned with having an Arbitrator render decisions as to the meaning of the contract than they were in restricting the arbitrator's jurisdiction." (363 U. S. 564 at 572.) On the contrary, the fact that the parties put in a section which began "As a specific limitation on the foregoing," which contained four major parts and numerous subparts, and which takes up a page and a half in the transcript of the record, suggests that the parties were generally more concerned with putting limitations upon the arbitrator's jurisdiction than in binding themselves to arbitrate the various questions which under Sections 1 through 5 were subject to negotiation.

If the existence of the slight and ambiguous exclusion clause in *Warrior & Gulf* broadened the scope of the Court's inquiry, the lengthy and detailed limitations in the contract at bar demand that the Court take care not to require the Company to arbitrate something which it never agreed to submit to arbitration.

Part A(1) limits arbitration to questions *directly* arising from applications, interpretations, or alleged violations *of the terms of this agreement*. Since the charge for which arbitration is sought is that the contracting out of work violated a term of the agreement, the Court must determine whether there is a term of the agreement dealing with the subject of contracting out work.

This is not to say that the Court may determine whether or not the agreement prohibits contracting out work. To do so would be for the Court to determine the merits of the grievance. But the Court must determine whether the subject of contracting out work is a "term of this agreement," for the parties have agreed that "as a specific limitation" "questions which may be referred to arbitration shall be limited to" "questions directly involving or arising from * * * the terms of this agreement." If there is no "term of this agreement" relating to contracting out, then a question involving contracting out cannot be a question "directly" (as the parties carefully said) involving or arising from a term of the agreement.

It is to be noted that the adjective "alleged" modifies the noun "violations" and not the noun "terms." Whether or not there was a "violation" was something which could be "alleged" and could turn out to be fictitious. But to be within the "specific limitation" of the contract, the "terms" must be genuine.

It is for the Court to find whether there are "terms of this agreement" dealing with the subject of contracting out.

The Union purported to find the subject of contracting out to be dealt with in Article I, § 1, of the contract. The Court must therefore determine whether the subject of contracting out is one of the "terms" of Article I, § 1.

Part D is the other side of the coin. As Part A(1) said that arbitration was limited to questions directly involving the terms of the agreement, so part D says that "each party shall have the right to refuse to arbitrate" "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement." (R. 12.)[11]

11. Part D reads in full as follows: "The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement

Putting the two parts together, the parties have said that if contracting out is one of the "matters" "which are not covered by this agreement," then "each party shall have the right to refuse to arbitrate any such matter." But if some limitation upon the Company's right to contract out work is one of the "terms of this agreement" then the Union is entitled to have a question directly arising from an alleged violation of those terms of the agreement submitted to arbitration.

It is apparent then, for the Court to determine whether the Company has promised to arbitrate a charge that it contracted out work, the Court must determine whether contracting out is one of the matters which are, or are not, "covered in this agreement."

That is what the Court of Appeals did. To have failed to do so would have violated the plain rules laid down by this Court in the Steelworkers Trilogy and succeeding cases.

The question is made easier by the fact that the Union, in Legal Paragraph I of its complaint has specified Article I, § 1, as the "term of the contract" which allegedly was violated. Article I, § 1, is entitled "Recognition." (R. 8.) It describes a group of employees who are represented by the Union, covered by the contract, and make up a "unit appropriate" for collective bargaining under § 9(a) of the National Labor Relations Act as amended.[12]

Article I, § 1, says the following, and only the following:

"The Company recognizes the Union as the sole and

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or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate."

12. Ch. 120, Title I, § 101, 61 St. 143, 29 USC § 159(a).

exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company [in the appropriate bargaining unit]."[13]

Article I, § 1, then, is no more than a statement by the Company that it recognizes that the Union has the status which it was given by the statute.

As stated above, the Court was required to determine whether contracting work is one of the matters covered by Article I, § 1. Obviously it is not mentioned explicitly. The words do not appear. It cannot be argued that somehow contracting out of work becomes a term of Article I, § 1, because it is somehow encompassed within "rates of pay, wages, hours of employment, and other conditions of employment." For part D of § 10 expressly says that there are "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement." As to those (and it is submitted that contracting out is one) "each party shall have the right to refuse to arbitrate." But "the Company will bargain with the Union with respect to" those matters and as to them "the no-strike clause * * * shall be suspended." In Article I, § 1, the Company recognizes the Union as the collective bargaining agent for that purpose. As to them, the Company has promised to bargain. It has not promised to arbitrate.

There were also other reasons for finding that the Company had not promised to arbitrate the question which the Union raised.

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13. The parties had simply copied the language of § 9(a) of the National Labor Relations Act as amended: "Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

One of these is the bargaining history. The Court said that it was "not controlling" but that it "fortifies the conclusion which we have reached that plaintiff's claim is without merit." (R. 49.)

The record is plain that repeatedly, over a period of years, the Union proposed the inclusion in the collective bargaining agreement of provisions restricting the right of the Company to contract out work. Bargaining has taken place on those proposals, they were rejected by the Company, and they were not included in the collective bargaining agreement. (R. 28-30.) The Union's repeated efforts to have the subject of contracting out included in the agreement supports the conclusion that contracting out was one of the "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement," as to which "each party shall have the right to refuse to arbitrate." (R. 12.) The Court of Appeals would have been justified in treating this fact as controlling, and not merely as something which "fortifies the conclusion which we have reached that plaintiff's claim is without merit." (R. 49.)

Another fact is the no-strike clause.

In *American Manufacturing* and *Warrior & Gulf*, this Court did treat the presence of a flat no-strike clause as an aid in interpreting the arbitration clause and finding it to be equally broad. "There is no exception in the 'no-strike' clause and none therefore should be read into the grievance clause, since one is the quid pro quo for the other." (*United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 at 567.) By the same token, and in the same degree, the express exception to the no-strike clause contained in part D of § 10 (R. 13) is an aid to interpreting the arbitration provisions of the contract at bar. As a no-strike clause without exceptions suggests an arbitration clause without

exceptions, so a limited no-strike clause suggests a limited arbitration clause.

A significant, indeed a compelling, aid in determining the scope of the Company's promise to arbitrate, is to be found in the relationship of the contract at bar to the prior litigation.

The prior litigation has been described in detail on pages 5 to 8 of this brief. It is there shown that the identical parties litigated whether the Company had promised by the provisions of an identical Article II, § 10, to arbitrate an identical grievance. The Court construed the contract language. It said that "The contested issue involved in both appeals is whether the respective grievance or dispute is one with respect to which the parties in their collective bargaining agreement have agreed to arbitration." (275 F. 2d 706 at 707.) The Court said: "The defendant had not contracted to refer the issue to arbitration. It is only where such a contract has been made and a promise broken that the court will order arbitration." (275 F. 2d 706 at 710.)

Thus on March 2, 1960 the Court of Appeals adjudicated, between the Company and the Union, that this contract language did not constitute a promise by the Company to arbitrate a claim that it contracted out work. Neither rehearing nor certiorari was sought. No change in the contract language was sought, but, on the contrary, five months later, on August 10, 1960, the parties executed an agreement containing that same language. It was thereafter, on October 17, 1960, that the contracting out took place, and on October 25, 1960 that the grievance was filed, both within the term of the agreement of August 10, 1960.

Can it be doubted that when the parties executed a contract with an adjudicated meaning, that was what they both understood to be the meaning of the contract they

signed? Is it not clear, under these circumstances, that the Company never promised, and never intended to promise, to arbitrate the contracting out of work? Is it not equally clear that under these circumstances the Union did not get, and did not expect to get, the promise of the Company to arbitrate the contracting out of work?

"For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Nav. Co.* (1960), 363 U. S. 574 at 582.

Plainly here the Company has not agreed to submit this dispute to arbitration.

The Court of Appeals properly so held.

III. THE PRIOR JUDGMENT PRECLUDES RELITIGATION OF THE ISSUES HERE PRESENTED.

This case presents a classic situation for application of the collateral estoppel doctrine. The issue presented is the interpretation and construction of the arbitration provisions of a collective bargaining agreement. The identical arbitration provisions have been continued without change in the successive collective bargaining agreements between the parties for several years. Under these provisions, a controversy between the parties arose as to the arbitrability of the same type of grievance several years ago, and the Union instituted litigation to obtain an authoritative construction and interpretation of those provisions, it contending, as it does here, that such a grievance is required to be arbitrated by the terms of the arbitration provisions.

While that litigation was pending, the same parties entered into a successor bargaining agreement and carried over into it the same contract terms, including the identical

arbitration provisions. The prior case went up to the Court of Appeals which adjudged that the contracting-out grievance is not within the arbitration provisions of the agreement.

After that decision, the Union made no effort to bring the case to this Court, even though the two decisions now principally relied upon had been pending in this Court on grant of certiorari for three months.[14] Instead, the Union not only accepted the Court of Appeals' decision interpreting the arbitration provisions, and made no attempt to get those provisions amended to conform to its claimed interpretation, but it voluntarily agreed to extend that agreement with the same arbitration provisions indefinitely. During the period of this extension, the grievance now relied upon arose. It is a grievance of the same kind and subject matter as that adjudicated in the prior case.

It is against this background that the Union seeks an encore of the litigation.

The collateral estoppel doctrine is a long established doctrine founded on sound and important policy considerations. It is a doctrine which is especially applicable to the type of case here presented—a controversy between the parties to a contract as to the interpretation of the contract as between the parties. As pointed out in 3 Corbin on Contracts, § 535 (1960):

> "There is no single rule of interpretation of language, and there are no rules of interpretation taken all together, that will infallibly lead to the one correct understanding and meaning. In understanding the variable expressions of others, men must do the best they can and results must be determined even though

[14] The Court of Appeals' decision in the prior case was issued on March 2, 1960. (R. 31.) This Court granted certiorari in the *American Manufacturing Co.* case on November 9, 1959 (361 U. S. 881) and in the *Warrior & Gulf Navigation Co.* case on December 7, 1959 (361 U. S. 912).

the understanding may be faulty. There is in fact no 'one correct' meaning of an expression; and the party choosing the expression may have no clear and conscious meaning of his own. In reading each other's words, men certainly see through a glass darkly; and yet it is necessary for men to act upon their understanding, and it is necessary to hold men responsible for inducing others thus to act.

"* * * If, after a careful consideration of the words of the words of a contract, *in the light of all the relevant circumstances*, and of all the tentative rules of interpretation based upon the experience of courts and linguists, a plain and definite meaning is achieved by the court, *a meaning actually given by one party as the other party had reason to know*, it will not disregard this plain and definite meaning and substitute another that is less convincing. Such a statement may be a mere truism; but it is not likely to lead to cocksure erroneous judgments." (Pages 15-16, 19-21.) (Emphasis added).

Plainly, as between the parties to a contract, once the interpretation of the contract has been adjudicated, that interpretation should be accepted, for if it does not accord with the intention of the parties, they can always make an appropriate amendment of it. And especially is this so in collective bargaining agreements which are of relatively short duration and subject to periodic reopening.

Indeed, the same considerations are involved in the companion "law of the case" doctrine, as shown by *Zdanok* v. *Glidden Co.* (2d Cir. 1964), 327 F. 2d 944, cert. den. 377 U. S. 934. In that case, the court adhered to a prior decision construing the same contract, even though new parties were present in the later case and even though the prior decision had been bitterly criticized and concededly raised doubt whether the court would construe other similar contracts in the same way. The court pointed out there:

"* * * Since the doctrine of the law of the case is ad-

dressed to the court's 'good use,' we see no reason why it should be peremptorily excluded because of the presence of new parties when the party against whom it is invoked was fully heard on a prior appeal, any more than that it must be rigidly applied whenever the parties remain the same. *The construction of a contract has long been recognized as the* type of issue '*that is particularly vulnerable to law of the case.*' Note, Law of the Case, 5 Stanford L. Rev. 751, 759 (1953), citing *Leese v. Clark*, 20 Cal. 387, 418 (1862)." * *

"This brings us to Glidden's argument that because of the additional evidence, which, it urges, was surely received with propriety in the Alexander action, the latter was not the same 'case' as that on which we previously ruled.

"* * * Still, with the issue of construction of the contract such a close one, we cannot be sure that the evidence now offered by Glidden and the inference from plaintiffs' failure to rebut it might not have tipped the scales on the prior appeal or be decisive in this one if properly before us. *But we hold that in the Alexander action also the new evidence should not be considered.*

"The reason for this lies in the principle *somewhat undescriptively called 'collateral estoppel'*; we hold that the ruling of liability in the *Zdanok* case precluded Glidden from offering new evidence to contest this not only against the five original plaintiffs but against the Alexander group as well." (327 F. 2d 953, 954.) (Emphasis added.)

The Union's argument that the collateral estoppel doctrine should not apply here rests on three propositions gleaned from this Court's decision in *Commissioner v. Sunnen* (1948), 333 U. S. 591. *Sunnen*, of course, was a federal income tax case and, concededly, the scope of the collateral estoppel doctrine in any case involving a question of public law as between the Government and a citizen is much more restricted than in a case involving a matter of private rights as between the parties. *U. S. v. Stoner &*

Downer Co. (1927), 274 U. S. 225, expressly recognizes this point in cases involving classification of duties under the Tariff Act. In there holding a plea of res judicata unavailing in such cases, this Court pointed out:

> "* * * These are the reasons, too, why the principle laid down by this Court in the decision already referred to, in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, should not apply or control. There, the thing adjudged was the existence of an immunity of the property of a bank from taxation, *due to a contractual obligation* of the state or city government to the bank,—*a personal relation which might without embarrassment and with much more safety be permanently fixed* for one tax payer than a question of fact or law affecting discriminatingly one of a whole class of importers and giving the exceptional operation in its favor of a general tariff on articles of merchandise largely imported." (274 U. S. 237.) (Emphasis added).

The same policy considerations, of course, are fully applicable in federal tax cases involving not personal relations but general public law application where a broad collateral estoppel rule could produce discrimination and inequity among taxpayers.

While collateral estoppel has been applied in tax cases, after the decision in *Tait* v. *Western Maryland Ry.* (1933), 289 U. S. 620, it began to be considered that the rule must be restricted. Thus, in *Griswold*, "Res Judicata in Federal Tax Cases," 46 Yale L. Jour. 1320 (1937), Dean Griswold urged that the doctrine should be rigidly limited in tax cases, saying:

> "Where different taxable years are involved in the two cases, res judicata should be applied much more narrowly than has been true in some cases in the past. Not only should it be confined to issues which are identical in the two cases, *but the word 'identical' should be rigidly construed to apply only to situations where the applicable statute is unchanged and all of*

the controlling facts occurred before the earlier of the tax years. Examples of such issues are the determination of March 1, 1913 value, the construction of a will or other instrument, and other situations in which the question may properly be thought of as static. An issue should not be regarded as 'identical' if it is merely similar, as where the question is whether an organization was a trust or association in successive tax years or was a personal holding corporation, or where the issue concerns different transactions or the construction or legal effect of different instruments, however similar the transactions or instruments may be. The ordinary rule of *stare decisis* is sufficiently rigid to provide for these situations; the extension of res judicata to them leads only to continued litigation as to its application.[194]

"194. This paragraph is entirely consistent with the Supreme Court's decision in *Tait* v. *Western Maryland Ry.*, 289 U. S. 620 (1933). The Court there referred to the rule as applying to the 'identical question' [*id.* at 624]; and the question there raised was of the sort here suggested as 'identical.' It is not necessary to modify or qualify any Supreme Court decision; *it is necessary only to fix the scope of the res judicata rule a little more narrowly, perhaps, than in non-tax cases, because of the inherent recurring nature of tax liability.*" (46 Yale L. Jour. 1357.) (Emphasis added).

Randolph Paul made an equally strong and similar plea in Paul and Zimet, "Res Judicata in Federal Taxation," *Paul, Selected Studies in Federal Taxation* (2d Series 1938), 104 at 140-148. This Court adopted this position in *Sunnen*, even to citing and relying on these same articles. (333 U. S. at 601-602.) Since *Sunnen*, it has been recognized that the collateral estoppel doctrine is applied more strictly in tax cases than in others. *Parker* v. *Westover* (9th Cir. 1955), 221 F. 2d 603, 605; *Commissioner* v. *Texas-Empire Pipe Line Co.* (10th Cir. 1949), 176 F. 2d 523, 525. The

limitations it places on the doctrine for income tax purposes, therefore, are not necessarily controlling in the present case which involves only a contractual obligation as between the parties and may without embarrassment and with much more safety be permanently fixed.

With these preliminary considerations covered, the Union's actual contentions against application of the collateral estoppel doctrine here may be separately considered.

1. The Happenstance That an Original Contract and Its Renewal Are Involved Does Not Affect Application of the Collateral Estoppel Doctrine.

The Union strenuously urges that the collateral estoppel rule cannot apply here because two separate agreements were involved, even though the language of the two is identical. *Sunnen* states such a rule "For income tax purposes" (333 U. S. 602), but the rule is plainly otherwise where the litigation involved is between the contracting parties and covers matters of private contract law rather than the application to private contracts of public law by the Government. *Price* v. *Sixth Dist. Agricultural Ass'n* (1927), 201 Cal. 502, 258 Pac. 387, is a specific application. There, prior litigation involved a lease from a city to the association. After that litigation the lease agreement was redrafted and a new instrument was executed to replace it. The changes were relatively minor, however. In holding the prior decision was conclusive of the current action, the court said in part:

> "* * * Appellants, admitting the general rule, however, seek to avoid the effect thereof by asserting that the causes of action are not the same; that the contract of June 21, 1920, made the subject of judgment by the District Court of Appeal on February 23, 1921, is not the basis of the cause of action here involved predicated upon the contract of November 15, 1921. *But it is*

> *undisputed that the latter contract is but a recast of the former and that the subject-matter covered by the two contracts is the same. The issue tendered by both agreements is as to the power of the city or county to contract in the same way respecting identical subject-matter.* In that sense the causes of action are identical. *Appellants make no attack upon the contract of November 15, 1921, because of the amendments thereto.* They assert no infirmity in the latter contract that is not likewise applicable, if correct, to the former. In order to overthrow the latter contract, it is necessary to upturn in toto the former. Indeed, it is axiomatic that if the former contract is legal and valid, the latter is valid also. *We have no hesitancy, therefore, in concluding that the causes of action are substantially the same and that the rule of law above announced is applicable, provided always that the parties are identical.*" (201 Cal. 509-510, 258 Pac. 390.) (Emphasis added.)

So here, the agreement in suit is but a renewal of the agreement involved in the earlier litigation between these parties, the subject matter covered is the same, the language is the same and no contention is advanced that the present agreement varies in any respect material to this case from the prior agreement.

Wolfson v. *Rubin* (Fla. 1951), 52 So. 2d 344,[15] is equally striking. In there sustaining a defense of res judicata in a contract case, the court said:

> "After that adjudication the 'identical terms of the provisions and conditions,' to quote the appellant's own brief, of the agreement involved in the first suit *were incorporated in a written contract that was executed by the parties and forms the basis of the present suit.*
>
> "As we have written, the court and the master agreed that the matter was res judicata, and we are

15. The official reports in Florida were discontinued prior to the date of this decision.

constrained to join them in that view. It is the appellant's idea that this principle cannot be invoked because the chancellor in the former suit went afield in interpreting the portion of the agreement now before us, as it was not put in issue by the pleadings. *There had been no appeal from the first decision and, even more, the appellant subsequently complied with it by signing a contract containing the exact language then adjudicated and now singled out as so uncertain as to be void.*

"*Aside from the peculiar position of acceding, without appeal, to the decree of a court construing language on one occasion and later seeking a decree of the same court to declare the same language so uncertain as to be impossible of understanding, we think the principle of res adjudicata is definitely applicable.* The interpretation of the whole contract had been sought and obtained in the first suit and, in addition, the plaintiff had prayed for general relief. Even if the matter had not been directly submitted, as we think it was, it would have fallen in the rule so often announced that a judgment on the merits in a suit between the same parties on the same cause of action by a court of competent jurisdiction operates as an estoppel, not only as to matters offered, but also '" as to every other matter which might with propriety have been litigated and determined in that action.'" Knabb v. Duner, 143 Fla. 92, 196 So. 456, 460." (52 So. 2d 345-346.) (Emphasis added.)

The "peculiar position" of the appellant there is echoed here in view of the Union's act, after the Court of Appeals' decision in the prior case, agreeing to extend the agreement with the identical provisions adjudicated in the prior case.

The same rule, of course, applies equally where separate but similar contracts are issued concurrently rather than *seriatim*, as in the foregoing cases. *Town of Beloit* v. *Morgan* (1869), 74 U. S. 619, 19 L. Ed. 205; *Tillman* v. *National City Bank* (2d Cir. 1941), 118 F. 2d 631, 633-635.

cert. den. 314 U. S. 650; *Gardner* v. *Buckbee* (N. Y. 1824), 3 Cow. 120 (repeatedly cited by this Court as an authority in this field.)

What all these decisions hold is that, whatever may be the result for other purposes and as to non-parties, as between the contracting parties themselves what is decided as to one contract will be conclusive on another contract not then in issue but identical to it. And, as pointed out in *Wolfson* v. *Rubin* (Fla. 1951), 52 So. 2d 344, this result should especially be so where the parties have renewed or re-executed a contract with the same controlling language after the prior decision has been entered.

This principle is especially applicable to collective bargaining agreements, for successive bargaining agreements are not separate, unrelated documents but a continuing statement of the whole employment relationship of the industry or plant (cf. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 1960, 363 U. S. 574, 578-580) and it is almost a hornbook principle that the parties to collective agreements share a degree of mutual interdependence which is seldom associated with simple contracts. Indeed, as stated in *Botany Mills* v. *Textile Workers Union*, (1958), 50 N. J. Super. 18, 141 A. 2d 107:

> "* * * While collective bargaining agreements are normally made for fixed periods of time, *they generally contemplate renewals and a subsisting contractual relationship between the employer and the union of indefinite duration.*" 50 N. J. Super. 29, 141 A. 2d 113.) (Emphasis added.)

As a matter of national labor policy, it is, therefore, of real importance that accepted adjudications and interpretations of the provisions of a collective bargaining agreement must be taken as binding on the parties until the parties

negotiate some change in them. For otherwise there can be no continuity whatsoever and the whole concept of voluntary agreement as the basis of labor relations becomes a shambles whereby the same language can mean one thing one time and the contrary the very next time either party feels like litigating the question over again.

2. The Fact That the Union Here Relies on Another Subparagraph of the Contract and on a New Grievance Does Not Provide an Escape From the Collateral Estoppel Rule.

The Union strenuously seeks to evade the collateral estoppel worked by the prior decision on the ground that the prior case involved subparagraph (3) of paragraph A of Section 10 of Article II of the contract, whereas this case presents a claim under subparagraph (1). But, plainly, the collateral estoppel doctrine does not admit of fragmenting claims by urging them to arise under different subparagraphs of the same section of the contract.

The Court of Appeals below carefully examined the briefs and pleadings in both the prior and the current cases, and pointed out that the contested issue in both cases, as stated in the Union's briefs, was whether the defendant Company had agreed to arbitrate its right to contract out work, and that in both cases the prayer for relief was exactly the same. (R. 49-50.) The grievance in the prior case was phrased in the same language as the grievance in this case. (*Independent Petroleum Workers* v. *Standard Oil Co.*, 7th Cir. 1960, 275 F. 2d 706 at 709; R. 19.) The prior decision was based on a review of the same Section 10A in its entirety. (*Ibid.*, 275 F. 2d 706 at 707-708.) The court's conclusion was that "The defendant had not contracted to refer the issue to arbitration." (*Ibid.*, 275 F. 2d 706 at 710.)

The controlling rule here is well stated in 2 *Freeman on Judgments*, 5th Ed., § 677 (1925), as follows:

> "But as to all matters expressly or necessarily adjudicated, a judgment is, of course conclusive, regardless of the difference in the causes of action. It is important to note in this connection, however, that even though the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, *the estoppel so far as that right, title or issue is concerned must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made.*" (Emphasis added.)

Price v. *Sixth Dist. Agricultural Ass'n* (1927), 201 Cal. 502, 258 Pac. 387, discussed above at pages 39-40 hereof, is a specific application of the rule. After setting forth the matter heretofore quoted holding the collateral estoppel rule applicable, the court went on to state:

> "Appellants, however, apparently have a misconception of this rule. *They seem to contend that an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated.* But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto." (201 Cal. 511, 258 Pac. 390-391.) (Emphasis added.)

Likewise, in *Hudson Transit Corp.* v. *Antonucci* (1948), 137 N. J. L. 764, 61 A. 2d 180, the court stated the rule:

> "The judgment of a court of competent jurisdiction on a question of law or fact, or on a question of mixed law and fact, once litigated and determined, is so long

as it stands unreversed, conclusive upon the parties and their privies, not only as to the subject of the particular action, but also as to all future litigation touching the subject matter. *This is so even though the prior and subsequent litigations involve different things*, if there be substantial identity in the subject matter of the two. *Where the right to relief in the one suit shall rest upon the same point or question which, in essence and substance, was litigated and determined in the prior suit, the parties and their privies are concluded, 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'* City of Paterson v. Baker, 51 N. J. Eq. 49, 26 A. 324, 325; Hancock v. Singer Mfg. Co., 62 N. J. L. 289, 339, 41 A. 846, 42 L. R. A. 852; In re Walsh's Estate, 80 N. J. Eq. 565, 74 A. 563." (127 N. J. L. 706-707, 61 A. 2d 182.) (Emphasis added.)

See also, *Town of Beloit* v. *Morgan* (1869), 74 U. S. 619, 19 L. Ed. 205; *Smith* v. *Town of Ontario* (C. C. N. Y. 1880), 4 Fed. 386; *National Labor Relations Board* v. *Brown & Root* (8th Cir. 1953), 203 F. 2d 139, 146; and *Zdanok* v. *Glidden Co.* (2d Cir. 1964), 327 F. 2d 944, 952-953, cert. den. 377 U. S. 934, quoted above at pages 35-36 hereof.

In short the collateral estoppel rule carries with it the same burdens with respect to issues litigated as the res judicata rule carries with respect to the entire cause of action. A party cannot fragment his arguments and points relative to an issue and thereby obtain the right of relitigation which the policy of the rule forbids. 50 C. J. S., Judgments, § 712(c). This is precisely what the court below held (R. 50) and is what the authorities require.

Nor can the estoppel be evaded because separate grievances are involved. The Union tries to liken this case to one involving "two negligence actions arising out of different automobile accidents involving the same parties"

(Brief for Petitioner, p. 24) in an attempt to turn attention from the fact that this is a contract case and involves not an adjudication as to an earlier tort, but rather a prior judicial interpretation of the same contract provisions. The rule here is:

> "* * * If the existence, validity or *construction of a contract*, lease, conveyance or other obligation has been adjudicated in one action it is res judicata when it comes again in issue in another action between the same parties, though the immediate subject matter of the two actions be different." (2 *Freeman of Judgments*, 5th Ed., § 672, p. 1418.) (Emphasis added.)

So, when a contract has been construed as to whether certain receipts are subject to a covenant for payment, that determination is binding in a later action between the parties involving later receipts but of the same class as those involved in the prior case. *Tioga R. R. Co.* v. *Bloss. and Corn. R. R. Co.* (1874), 87 U. S. 137, 22 L. Ed. 331, 334. So also, in *N. L. R. B.* v. *Brown & Root* (8th Cir. 1953), 203 F. 2d 139, a determination in a prior case that two companies were separate entities was binding in a later case arising under a later, but similar, claimed unfair labor practice. The same reasoning is implicit in *Fishgold* v. *Sullican Drydock & Repair Corp.* (1946), 328 U. S. 275. In there holding that a union had an appealable interest in an action brought by an employee for declaratory relief as to his rights under the Selective Training and Service Act of 1940, this Court noted that the union and the employer were parties and their collective bargaining agreement was in issue. This Court then pointed out:

> "* * * But, however the result might be rationalized, a decision for or against petitioner necessarily *involved a construction of the collective bargaining agreement.*

> *That issue was adjudicated, with the union as a party.* Hence, if the union had thereafter instituted a separate suit for an interpretation of the agreement, *it would be met with the plea of res judicata. And that plea would be sustained*, for the prior decision was on the precise point which the union sought to relitigate and was adverse to the union. And both parties to the agreement—the union and the corporation—were parties to the prior suit." (328 U. S. 282.) (Emphasis added.)

Any later case would, of course, involve different employees and a different grievance, but as this Court noted, the adjudicated construction of the agreement would still be "res judicata" of the meaning of the agreement in the subsequent action.

So here, all the Union has done is to shift its argument for arbitrability under the contract and apply it to another grievance of exactly the same language, character and subject matter as that involved in the prior case. Under the authorities, the prior interpretation and construction that such a grievance was not within the arbitration provisions is determinative of the issue and cannot now be relitigated all over again on the basis here urged by the Union.

3. The Intervention of the Steelworkers Trilogy Does Not Make the Collateral Estoppel Rule Inapplicable.

Finally, the Union urges that the decisions of this Court in the Steelworkers Trilogy after the decision in the prior case make the prior decision obsolete and the collateral estoppel rule is thereby evaded. Here again, it must be emphasized that the effect on the collateral estoppel rule of intervening judicial decisions indicative of a change or

development in the controlling legal principles is one thing where the Government is a party and the legal issues are matters of important public law, but quite another in a simple contract action involving only private rights under the contract. In the former, even "legal modulations by this Court" (*Commissioner* v. *Sunnen*, 333 U. S. 591, 600) require reconsideration, and in the latter cases a decisive change in the law is required. *Dr. Salsbury's Laboratories* v. *I. D. Russell Co.* (8th Cir. 1954), 212 F. 2d 414, 416, cert. den. 348 U. S. 837. Cf. 2 *Freeman on Judgments*, 5th Ed., § 713 (1925).

As has been heretofore noted (pp. 34-35, *supra*), the interpretation of a contract is always a difficult task of determining the meaning of the words in the light of all relevant circumstances and, indeed, the question of the interpretation of a contract is a question of fact, not a question of law. 3 *Corbin on Contracts*, § 554 (1960). As such, it constitutes the type of issue as to which the collateral estoppel rule is peculiarly applicable.

Regardless of whether the issue may be characterized as a pure fact issue, it is plain that in cases such as this, the collateral estoppel rule cannot be sidestepped on the grounds advanced by the Petitioner here.

The Steelworkers Trilogy does not, of course, attempt to make any change in the basic rules that the arbitrability of labor grievances must be measured by the voluntary agreement of the parties, and that it is a matter for the courts to determine whether the agreement made embraces a grievance of the kind involved. These were the rules applied by the court below in the original case. *Independent Petroleum Workers* v. *Standard Oil Co.* (7th Cir. 1960), 275 F. 2d 706, 707, 709, 710. While the opinion in that case did

contain one citation to the reversed lower court opinion in *Warrior & Gulf* (*Ibid.*, 275 F. 2d at 709), the decision was not based upon that as an authority, but took into account the fully developed record of stipulated facts in interpreting the agreement, as must be done in interpreting any contract. 3 *Corbin on Contracts*, § 535 (1960), quoted above at pages 34-35 hereof. The claim now made that the lower court's prior decision "relied heavily" on the reversed lower court decision in *Warrior & Gulf* (Petitioner's brief, p. 6) is exaggerated. The court cited it once for comparison. It neither quoted nor discussed it. Its decision did not rest upon it. It is notable that the Union did not think, at that time, that the decision was so founded, since it made no effort to apply to this Court for a writ of certiorari, even though the court of appeals' decision in *Warrior & Gulf* was then pending before this Court, certiorari having been granted in it some several months before.

Likewise, the Trilogy decisions made no attempt to innovate some new rule of substantive law to govern collective bargaining contracts. Indeed, these decisions marked no decisive change in the law, but rather constituted examples of the orderly development of legal principles in the way common in our jurisprudence. Unless the collateral estoppel rule is to be denuded of all significance, changes of this character cannot be a basis for avoiding the rule, for the law is constantly growing and developing and is never absolutely static.

Plainly, the collateral estoppel rule does not permit that every adjudication relied on may be re-examined to determine whether it would now be decided the same way by an upper court. Indeed, if review by this Court of the prior decision had been desired, it could have been sought

during the time the Trilogy cases were pending before this Court. The rule controlling this case is *United States* v. *Moser* (1924), 266 U. S. 236. That was an action by a retired naval officer to recover retirement pay, and the fighting issue was whether his service at the Naval Academy constituted service during the Civil War. In prior litigation before the Court of Claims on prior installments of salary, the same issue had been litigated and determined in the officer's favor. After the first two suits, the Court of Claims reached a contrary result in the case of another claimant on the ground of another statute called to the court's attention for the first time. The final action arose thereafter and involved later pay periods. This Court refused even to consider the effect of the newly found statute on the ground of the collateral estoppel rule and said on this point:

> "The suits here are upon different demands; and the point at issue is to be determined by applying the second branch of the rule. The question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged in favor of the claimant in the three preceding suits, viz.: whether he occupied the status of an officer who had served during the civil war.
>
> "The contention of the Government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. *It does not apply to unmixed questions of law.* Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. *But a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by*

an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based." (266 U. S. 242.) (Emphasis added.)

This specific language has been since approved in *Partmar Corp.* v. *Paramount Corp.* (1954), 347 U. S. 89, 103, and the principle has been recognized in *Kennedy* v. *Mendoza-Martinez* (1963), 372 U. S. 144, 157. The claim Petitioner here advances comes squarely within this rule, and it, accordingly, falls.

CONCLUSION.

The Court of Appeals followed exactly the principles laid down by this Court. It examined the contract to see whether the Company had promised to arbitrate this grievance. It made that examination in the way prescribed by this Court. It found, correctly, that the Company did not so promise.

Essentially the Union contends that because this Court found a promise to arbitrate in the *American* and *Warrior* contracts, the Court of Appeals erred in not finding such a promise in this contract. The Union ignores the fact that the contracts do not resemble each other. The principle laid down by this Court is that the lower court must interpret the particular contract, not that it find in every case for the Union.

The meaning which the Court found the arbitration provisions to have, was the same meaning which it was adjudicated to have in a prior action between the same parties. After that adjudication they bound themselves again to the same language. If they intend a different meaning, they must bargain for and agree to different language. If that is not the rule between unions and employers, litiga-

tion and relitigation will be encouraged instead of bargaining, and a vital national labor policy will be frustrated.

The judgment of the Court below should be affirmed.

Respectfully submitted,

RICHARD P. TINKHAM,
DANIEL F. KELLY,
ALLEN W. TEAGLE,
708 Calumet Building,
Hammond, Indiana 46320,

DONALD L. HASTINGS,
910 South Michigan Avenue,
Chicago, Illinois 60680,

FREDERIC D. ANDERSON,
JERRY P. BELKNAP,
JAMES F. HILLIS,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Attorneys for Respondent.

TINKHAM, BECKMAN, KELLY AND SINGLETON,
Hammond, Indiana 46320,

BARNES, HICKAM, PANTZER & BOYD,
Indianapolis, Indiana 46204,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.
Petitioner

v.

AMERICAN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

WILLIAM BELSHAW
BENEDICT R. DANKO
1450 119th Street
Whiting, Indiana 46394

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Petitioner

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IN THE

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INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
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v.

AMERICAN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

I. BOTH ISSUES RAISED BY THE COMPLAINT ARE BEFORE THIS COURT.

The Company contends, in its Brief (p. 25), that the only issue before this Court is whether the Union's grievance is subject to arbitration under Article II Section 10A(3) of the collective bargaining agreement. It argues that the Union's claim for arbitration under Article II, Section 10A (3) was "dismissed" by the district court, and that the Union abandoned that claim when it failed to appeal the "dismissal."

In order to demonstrate the error of this argument, it is necessary to summarize the procedural history of this case.

The Union's complaint was in two Paragraphs. Paragraph I alleged that the Company was obligated to arbitrate

the grievance under Article II, Section 10A(1) of the agreement, providing for arbitration of alleged violations of the terms of the agreement. Paragraph II alleged that the Company was obligated to arbitrate the grievance under Article II, Section 10A(3) providing for the arbitration of alleged noncompliance with past practices (R. 4-7). The Union moved for summary judgment on Paragraph I of its complaint (R. 17). The Company moved for summary judgment as to *both* Paragraph I and Paragraph II (R. 24).

The district court disposed of the summary judgment motions with the following order:

> "The Motion of the plaintiff for Summary Judgment as to Paragraph I of the amended complaint is granted.
>
> "Defendant's motion for Summary Judgment as to Paragraph I of the amended complaint is denied.
>
> "Defendant's Motion for Summary Judgment as to Paragraph II of the amended complaint is denied.
>
> "Since the questions raised by Paragraph II of the amended complaint are now moot, Paragraph II is ordered dismissed" (R. 38).

It is apparent from this order that the district court did not rule against the Union, or in favor of the Company, on Paragraph II of the complaint. On the contrary, the court specifically denied the Company's motion for summary judgment with respect to both Paragraph I and Paragraph II. But the court adopted the view that its decision in the Union's favor under Paragraph I was in itself sufficient to give the Union the full relief which it was seeking, and thus it dismissed Paragraph II as "moot."

In accordance with this view, the district court's "Judgment and Decree" directed the Company "to join with the plaintiff in the submission of the grievance described in the complaint to arbitration in accordance with the provisions of the collective bargaining agreement . . ." (R. 42). Plainly,

this order required the Company to arbitrate the grievance in its entirety.

It is immaterial whether the district court was correct in its view that Paragraph I of the complaint was a sufficient basis for granting the full relief sought in the complaint.[1] If the court erred in this regard, the error was in favor of the Union. Surely the Union had no basis for appealing the district court's decision, since the decision gave the Union everything it asked for. Only the Company had grounds for an appeal.

The Company filed a notice of appeal "from the final judgment entered in this action on March 13, 1963" (R. 43). This necessarily brought the entire case before the court of appeals. Indeed, the Company's brief to that court stated as the first of "the contested issues" to be decided on appeal the following:

> "Whether the defendant did or did not breach its agreement with the plaintiff union when it refused to submit its right to contract out work to arbitration?" (Br. for Defendant-Appellant, p. 8).

Accepting this view, that only a single issue was presented by Paragraphs I and II, the court of appeals reversed the district court and directed "that plaintiff's motion for summary judgment be denied and defendant's motion allowed" (R. 53). Since the Company's motion sought summary judgment on both parts of the complaint, the court of appeals' order directing that the motion be granted would necessarily require the district court to vacate its original order and judgment, including both the portion granting summary

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[1] The district court's decision can be justified on the theory that Article II, Section 10A(3) of the agreement creates an implied contractual obligation on the part of the Company to adhere to past practice. On this theory, any claim that the Company has departed from past practice is also a claim that the Company has violated the agreement and is therefore subject to arbitration under Section 10A(1).

judgment for the Union on Paragraph I, and the portion denying summary judgment to the Company on Paragraph II and dismissing that Paragraph as moot.

It is clear, therefore, that both Paragraphs I and II of the complaint are now before this Court. The Company moved for summary judgment on both paragraphs of the complaint and the court of appeals directed that summary judgment be entered for the Company on both paragraphs.

While there thus can be no doubt that both issues in this case are before this Court, it is apparent that the Company, the court of appeals, and perhaps the district court as well, failed to understand that the complaint does indeed raise two separate issues. The Company has argued this case, and both courts below decided it, as if it presented the single issue of whether contracting out was a subject about which arbitration is required. Thus, the Company and both courts seemed to assume that the two paragraphs of the complaint are simply alternative grounds for the same relief—an order directing arbitration of the subject of contracting out.

But the agreement does not provide for arbitration of "subjects." It provides for arbitration of questions. Whether or not a particular grievance is arbitrable depends not upon the subject matter of that grievance, but on the nature of the question raised with respect to that subject matter.

Under Section 10A(1) of Article II, any "alleged violation of the terms of this agreement" is arbitrable. Thus, a grievance which claims that the Company has violated the agreement is subject to arbitration—irrespective of whether the subject of the grievance is wages, seniority, contracting out, or anything else. But the only question which the arbitrator can decide, under that section, is whether the Company's action violated the agreement.

Similarly, any claim by the Union that the Company has departed from past practice is arbitrable under Article II, Section 10A(3), so long as the subject matter relates to working conditions. But the only question the arbitrator can

decide, under that section, is whether the Company did not comply with, or modified, its past practice, policy, custom, or usage.

Under neither section would a grievance which claims that the Company had done something "unfair" or "unlawful" be arbitrable, irrespective of its subject matter, because the Company has not agreed to arbitrate the fairness or legality of its conduct. Under Section 10(D) such a grievance, if related to wages, hours of employment, or any other condition of employment, could be settled by a strike.

Thus, the two Paragraphs of the Union's original complaint are not alternative grounds for reaching the same result, as the Company and both courts below seem to have assumed. Rather, they are two separate claims, both of which are before this Court because the court below directed that summary judgment be entered for the Company on them. If, as we contend, the grievance is arbitrable under both sections of the agreement, then the Union is entitled to present both issues raised by the grievance to the arbitrator.

II. THE COMPANY'S ARGUMENT ON THE MERITS IS SQUARELY IN CONFLICT WITH *AMERICAN MANUFACTURING* AND *WARRIOR & GULF*.

The Company's brief labors mightily, but fails utterly, to distinguish the agreement involved in this case from those which were before the Court in *American Manufacturing* and *Warrior & Gulf*.

The Company starts with the premise that, under the agreement in this case, not all questions which are subject to the grievance procedure are subject to arbitration. From this premise, the Company somehow draws the conclusion that one of the limitations contained in the agreement is that only grievances dealing with subject matters which the parties agree, or a court finds, are dealt with in the agreement are subject to arbitration.

This argument is a *non sequitur*. It is true that the arbi-

tration clause in this case is phrased in terms of limitations, and that not all matters which are subject to the grievance procedure are subject to arbitration. But that is not the question in this case. No one is arguing that the arbitration clause involved here is unlimited.

The question which this Court must decide is whether the particular grievance here falls inside or outside the limitations on arbitration established by the agreement.

We have already demonstrated in our principal brief that the arbitration provision in this case is indistinguishable from those which were involved in *American Manufacturing* and *Warrior & Gulf*. And the Court plainly held in those cases that under this type of arbitration clause a grievance which claims that there has been a violation of the agreement is subject to arbitration, irrespective of the court's view as to whether there has in fact been a violation, and irrespective of the court's view as to whether the particular subject matter of the grievance is even dealt with in the agreement.

As we also pointed out in our original brief, there is a substantial body of arbitration opinion holding that the typical recognition clause in a collective bargaining agreement, such as the one involved here, does impose some restrictions on management's right to contract out work. There are at least 23 reported arbitration awards so holding.[2] Since the parties in this case have agreed that an arbitrator, and not the courts, should interpret their agreement, it would obviously be improper for a court to deny arbitration of the grievance in this case because *it* believes that the recognition clause does *not* limit management's freedom to contract out work.

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[2] In our original brief, we referred to the tabulation of arbitration awards on contracting out contained in *Celanese Corp.*, 33 Lab. Arb. 925, 942-43 (1959), which shows that there were 16 cases as of 1959 in which arbitrators had so held. A more recent study shows that there are at least 7 more such awards since the decision in *Celanese*. Greenbaum, *The Arbitration of Subcontracting Disputes: An Addendum*, 16 Industrial and Labor Relations Review 221, 225 (1964).

That is precisely the kind of question which the parties have provided should be decided by an arbitrator.

We wish to make only one further comment on the Company's argument on the merits. In our original brief, we stated that the agreement involved in this case was executed before the earlier litigation between the parties was decided by the court of appeals. The Company points out that the parties extended the agreement after the court of appeals' decision in the earlier case, and contends that this extension should be construed as a ratification of the court's original decision.

It is questionable whether the mere extension of an existing agreement should be treated as if it were a renegotiation of the agreement. But, in any event, the extension to which the Company refers took place on August 10, 1960. By that time, this Court had already decided *American Manufacturing* and *Warrior & Gulf*. If we are correct in our argument that those decisions necessarily overruled the Seventh Circuit's earlier decision, then surely the Union was not required to seek an amendment to the agreement in order to avoid the effects of an erroneously decided case. On the contrary, this Court's decisions put the Company on notice that the Seventh Circuit's earlier decision was erroneous, and that the agreement would have to be changed if the Company wished to avoid in the future the arbitration of grievances such as the one involved in the earlier case.

III. THIS ACTION IS NOT BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

In our main brief, we pointed out that, in relation to the earlier case, this case involves a different grievance arising out of a separate and unrelated Company action, and that therefore there could be no claim of *res judicata*. We then advanced three distinct reasons why it would be improper to apply the doctrine of collateral estoppel, as urged by the Company, to prevent the arbitration of all grievances which

involve the contracting out of work irrespective of their particular facts. If we are correct in any one of these arguments, the defense of collateral estoppel must fail. The Company has argued extensively against each of these contentions. We shall review their arguments briefly.

1. We showed in our main brief that a decision adjudicating the meaning of one contract is not binding, as a matter of collateral estoppel, in an action involving a different contract, even if the contractual language is the same. (Pet. Br. 25-26). While the Company cites cases which it claims hold to the contrary, it is clear from a reading of those cases that they do not support the Company's claim.

But the Company also advances another, possibly more valid consideration. It says that successive collective bargaining agreements should not be treated as separate contracts but as "a continuing statement of the whole employment relationship of the industry or plant." The Company argues from this that whatever the rule may be with respect to ordinary contracts, an interpretation rendered under a collective bargaining agreement should "as a matter of national labor policy" preclude relitigation of the same question "until the parties negotiate some change" in the relevant language. (Resp. Br. 42-43).

This is an attractive argument, although it would seem more properly an argument in favor of *stare decisis*, not collateral estoppel. The question of the application of *stare decisis* to successive collective bargaining agreements has been much discussed by arbitrators in connection with the substantive provisions of collective bargaining agreements.[3] Fortunately, the implications of this question for collateral estoppel purposes need not be decided in this case, since there are two other and wholly adequate bases on which to dispose of the collateral estoppel issue.

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[3] See, e.g., *Bethlehem Steel Co.*, 20 L.A. 87 (Seward, 1953); *Federal Bearings Co.*, 22 L.A. 721 (Justin, 1954); *Ford Motor Co.*, 30 L.A. 46 (Platt, 1958).

2. In our main brief we demonstrated that the doctrine of collateral estoppel is inapplicable if "a change or development in the controlling legal principles" makes the earlier determination "obsolete or erroneous, at least for future purposes . . ." *Commissioner* v. *Sunnen*, 333 U. S. 591, 599. (Pet. Br. 24-25). The Company concedes that there can be no collateral estoppel where "a decisive change in the law" renders the earlier decision obsolete (Resp. Br. 48).

Whether the proper standard is the one stated by this Court or the one stated by Respondent is immaterial. For it has been universally recognized that this Court's subsequent decisions in *American Manufacturing* and *Warrior & Gulf* constituted a decisive change from the view of the law reflected in the Seventh Circuit's first decision and the decisions of other lower courts.

This is clear, first, from the fact that this Court in those very cases was reversing decisions of the Sixth and Fifth Circuits. It is clear, further, from the statement in the dissenting opinion in *Warrior & Gulf*, that "the Court today departs the established principles" of earlier commercial arbitration decisions. It is likewise clear from the subsequent statements of both courts and commentators. See, e.g., *Sinclair Refining Co.* v. *N.L.R.B.* 306 F. 2d 569, 570 (5th Cir. 1962)[4]; Hays, *The Supreme Court and Labor Law*, 60

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[4] Perhaps the most eloquent recognition of the change is that of Judge Brown in *Sinclair*:

> "Time and tide, it is said, waits for no man. Neither does the law. For we may acknowledge that in all likelihood the result of this decision is different from what it would have been just five years ago. What has brought this about is not the slow but sure erosion of cherished and ancient precedents or the most spectacular overruling of them by name. Neither has it been the consequence of new legislation. What has brought this about is the recent judicial declaration of an intervening Congressional policy which in turn calls for judicial adaptation and accommodation . . .
>
> ". . . The intervening event regarded by us as portentous is the action of the Supreme Court in the trilogy concerning enforce-

Colum. L. Rev. 901, 919 (1960); Note, 46 Cornell L.Q. 336 (1961); Levitt, *The Supreme Court and Arbitration,* NYU Fourteenth Annual Conference on Labor 217 (1961); *Report of Special Warrior & Gulf Committee,* 1963 Proceedings of ABA Section of Labor Relations Law, Part II, p. 196; *Minority Report, Special Warrior & Gulf Committee,* id. at p. 208.

Indeed, the district court in this very case stated that "Had *Warrior* been decided prior to *Independent Petroleum Workers* v. *Standard Oil Co.*, I think the outcome would have been different" (R. 41). And the Seventh Circuit has elsewhere intimated that it shares this view. *United Auto Workers* v. *Webster Elec. Co.* 299 F. 2d 195, 196-97 (7th Cir. 1962).

In any event, this Court's decision on the merits of the present case will dispose of this issue as well. For if this Court holds, as we contend it must, that the principles enunciated in *American Manufacturing* and *Warrior & Gulf* entitle the Union to arbitrate the grievance in the present case, then necessarily the Seventh Circuit's decision in the first case—that the Union was not entitled to arbitrate a similar contracting out grievance—represented a view of the law which has been rendered obsolete by the subsequent decisions in *American Manufacturing* and *Warrior & Gulf.*

3. Finally, we demonstrated in our main brief that the decision in the first case could not in any event bar litigation concerning Section 10A(1) of the agreement, for the Union's rights under Section 10A(1) were not litigated in the first case and "a judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of law not litigated in the first action." Restatement, Judgments § 70 Comment c (1943). (Pet. Br. 22-24). The Company does not dispute that the present case

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ment of agreements to arbitrate." [Citing *American Manufacturing, Warrior & Gulf;* and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).]

involves a different cause of action from the first case. Nor does it disagree with our statement of the controlling legal principle. Its sole contention is that the present case involves only one question of law, the same question as that in the first case—"whether the defendant Company had agreed to arbitrate its right to contract out the work" (Resp. Br. 43). This argument is simply another aspect of the Company's misunderstanding of the issues in this case, to which we have referred earlier.

In the prior case, the sole issue was whether "the grievances concerning performance of maintenance and repair work by an independent contract are arbitrable *under the provisions of Section 10A(3) of the agreement* referring to past practices relative to working conditions." (275 F. 2d at 708, emphasis supplied). The Seventh Circuit's decision was that "the language of *Section 10A(3) of the agreement* . . . does not include within its scope the subject of contracting out. . . ." (*Id.* at 709, emphasis supplied.)

The present case involves in addition the Union's claim to arbitration under Section 10A(1). And, contrary to Respondent's assertion, this is not simply another "argument" for granting the same relief as was sought in the first case, and as is sought here under Section 10A(3). If arbitration were ordered solely under Section 10A(3), the only question to be decided by the arbitrator would be whether the Company's action violated past practice. If arbitration were ordered solely under Section 10A(1), the only question to be decided by the arbitrator would be whether the Company's action violated the terms of the agreement. The Union in this case thus seeks to arbitrate two entirely separate questions. And the Seventh Circuit's first decision did not decide, one way or the other, whether it is entitled to arbitrate the latter question.

As we have said, arbitrability is determined not by the subject matter of the grievance, but by the nature of the claim made in the grievance. A grievance claiming that a

particular act of contracting out is "unfair" would be non-arbitrable, *not* because it is a contracting out grievance, but because the Company has not agreed to arbitrate the "fairness" of its conduct. A judicial decision denying arbitration of such a grievance surely would not preclude the Union from subsequently seeking arbitration of a grievance that another act of contracting out violated past practice (10A (3)) or violated the terms of the agreement (10A(1)). Likewise the Seventh Circuit's first decision—that the Company has not agreed to arbitrate claims that its acts of contracting out violate "past practice"—cannot preclude a subsequent suit to arbitrate a grievance claiming that a different act of contracting out violates "the terms of the agreement."

CONCLUSION

For the reasons set forth in our main brief, and in this reply brief, the judgment of the court below should be reversed, and the Company should be ordered to arbitrate the grievance under both Sections 10A(1) and 10A(3) of Article II of the agreement.

Respectfully submitted,

WILLIAM BELSHAW
BENEDICT R. DANKO
1450 119th Street
Whiting, Indiana 46394
DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
Attorneys for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,
Petitioner

v.

AMERICAN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

WILLIAM BELSHAW
BENEDICT R. DANKO
1450-119th Street
Whiting, Indiana 46394

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

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PETITION FOR REHEARING

On November 23, 1964, this Court rendered a per curiam opinion in this case affirming the judgment below by an equally divided vote (Mr. Justice Goldberg not participating). At the time that decision was rendered, there was pending in this Court a petition for certiorari in *General Elec. Co.* v. *International Union of Elec. Workers,* No. 413, This Term, in which certiorari was sought on the ground (among others) that the Second Circuit's decision in *General Electric* was in conflict with the Seventh Circuit's decision in the present case. On December 7, 1964, this Court denied certiorari in *General Electric.*

As the result of these two decisions, the law has been left in a state of confusion. The Court's decision disposes of the present litigation, but it sheds no light on the legal issues which are here involved. Since the parties have a continuing collective bargaining relationship, in which the issues involved in this case are bound to arise in the future,

the undersigned counsel have been asked to file this Petition for Rehearing in the hope that some means might still be found for resolving those issues in this case, and thereby avoiding wasteful future litigation which would inevitably have a disruptive effect on the parties' continuing collective bargaining relationship.

We recognize that rehearing is rarely granted by this Court. We believe, however, for the reasons set forth below, that this is an appropriate case for rehearing.

I. A CRITICAL FACT, NOT STRESSED IN THE BRIEFS OR THE ORAL ARGUMENT, MAY WELL HAVE BEEN OVERLOOKED BY THE JUSTICES WHO VOTED TO AFFIRM THE DECISION BELOW.

The absence of any opinion in this case makes it difficult to determine on what basis four Justices of this Court voted to affirm the decision below. The denial of certiorari in the *General Electric* case, however, suggests that there are not four Justices who are ready to depart from the basic principles established in *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 593 (1960) and *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 633 (1960). Accordingly, the decision in this case must have been based on facts which were not present either in the *General Electric* case or the *American Manufacturing* and *Warrior & Gulf* cases.

The one fact which distinguishes the present case from these others is that the issue involved in the present case was previously litigated between the parties in an earlier case involving a similar grievance under an earlier agreement. The Company argued that the earlier adjudication was binding as a matter of collateral estoppel in the present case. We are satisfied that we fully answered that argument in our briefs. But in addition to urging that the earlier decision was binding as a matter of collateral estoppel, the Company also argued that the re-execution of

a new collective bargaining agreement subsequent to the prior decision constituted a sort of ratification by the parties of the interpretation of the contract which the Seventh Circuit had placed on it in the prior case.

It is in connection with this argument, which may well have influenced one or more Justices to vote for affirmance, that we wish to bring to the Court's attention a critical fact which we did not previously stress. That fact is that the grievance in the present case arose *before* any new agreement had been adopted.

The sequence of events is as follows: The earlier case was decided by the Seventh Circuit on March 2, 1960. The contract which was then in effect between the parties was to expire on August 15, 1960. On June 20, 1960, this Court decided the *American Manufacturing* and *Warrior & Gulf* cases, setting forth, for the first time, the standards which would apply in the determination of the "arbitrability" question. On August 10, 1960, the parties agreed to extend their agreement "subject to cancellation by either party upon giving to the other of seventy-two hours' notice." This extension remained in effect until December 22, 1960. (R. 26) On that date, a new agreement between the parties became effective.

The grievance involved in this case arose on October 25, 1960, during the extension period, and before a new contract was executed. (R. 19)

When a collective bargaining agreement is about to expire, and the parties wish to continue their negotiations for a new agreement without a strike, the common practice is to continue the old agreement in effect on a day-to-day basis. Such an interim extension does not indicate that the parties are satisfied with the terms of the old agreement. Indeed, it indicates just the contrary, since the whole purpose of such an extension is to provide a period of time within which the parties may negotiate a new agreement. Plainly, that was the situation here, since the extension was

subject to cancellation upon 72 hours' notice, and was shortly followed by the execution of a new agreement.

Neither party has previously brought to this Court's attention, either in the briefs or in the oral argument, the fact that the extension agreement under which this case arose was subject to cancellation upon 72 hours' notice. That fact, which may well have been overlooked by the Court, clearly demonstrates that the "extension" cannot be regarded as a re-adoption of the agreement, but rather was simply a means of avoiding a strike, and preserving the status quo, until such time as a new agreement could be arrived at. In any case, both the "extension" and the new agreement were executed after this Court's decision in the *American Manufacturing* and *Warrior & Gulf* cases and therefore could be as certainly said to adopt those opinions as the earlier opinion of the Seventh Circuit in the prior litigation.

II. THE PER CURIAM AFFIRMANCE OF THE DECISION BELOW MAY CREATE CONFUSION ON A QUESTION OF LAW WHICH HAS HERETOFORE BEEN CLEARLY UNDERSTOOD BY THE LOWER COURTS.

In *American Manufacturing* and *Warrior & Gulf*, this Court established principles for determining the arbitrability of grievance disputes which have been clearly understood and followed by virtually all the lower courts. The lone exception appears to be the court below, which, in its holdings in this case and in *Piano and Musical Instrument Workers Union* v. *W. W. Kimball Co.*, 333 F. 2d 761 (1964), has evidenced what we believe is a basic misunderstanding of those principles. Indeed, this Court, subsequent to its *per curiam* decision in the instant case, has reversed *per curiam* the Seventh Circuit's decision in *Kimball*, citing *inter alia American Manufacturing*, No. 535, This Term, 33 U.S.L. Week 3217 (December 14, 1964).

It is clear—from the unanimous reversal of *Kimball* and the denial of certiorari in *General Electric* (*supra*, p. 1)—that this Court does not intend to depart from the principles of *Warrior & Gulf* and *American Manufacturing*. Yet the affirmance without opinion of the decision below may create confusion generally among the lower courts as to the status of those decisions. The opinion below clearly departs from the principles of those decisions, yet this Court has affirmed the decision of the court below.

If, as we believe, the four justices who voted to affirm did so because of the peculiar facts of this case, and not because they agreed with the Seventh Circuit's analysis of *American Manufacturing* and *Warrior & Gulf*, the confusion which may result will be doubly unfortunate.

Accordingly, we urge that rehearing be granted, in the hope that a majority decision can be obtained, and that a clarifying opinion thus would be forthcoming.

III. THIS COURT WILL SHORTLY BE PRESENTED WITH ANOTHER CASE FROM THE SEVENTH CIRCUIT RAISING THE SAME ISSUES AS ARE INVOLVED HERE.

There is presently pending in the Seventh Circuit a case entitled *United Packinghouse Workers* v. *Wilson & Co.*, Docket No. 14467. In that case, a union sought to compel arbitration of a contracting-out grievance under an agreement essentially indistinguishable from the one involved in this case. On June 3, 1964, the following order was entered by the Seventh Circuit in that case:

> "Oral arguments on this appeal were heard by this Court on June 3, 1964, and the case was taken under consideration. The issues herein are substantially the same as certain issues decided by this Court in Independent Petroleum Workers v. American Oil Co., 7 Cir., 324 Fed. 2d 903 (1963). On May 18, 1964 the

United States Supreme Court granted certiorari in the Independent Petroleum Workers case.

"IT IS ORDERED that further action by this Court on the instant case be withheld until the United States Supreme Court has acted on the Independent Petroleum Workers case, and that the instant case be stricken from the current calendar."

Since this Court has now affirmed the Seventh Circuit's decision in the present case, that court can be expected to decide the *Wilson* case in accordance with its prior decision in the present case. We are informed by counsel for the United Packinghouse Workers that, in such event, he intends to file a petition for certiorari seeking reversal of the Seventh Circuit's decision.

Thus, it appears inevitable that the issues presented in this case, which have not really been resolved, will shortly be presented to the Court again in another case.

A similar situation was presented to this Court in 1933 in the cases of *Helvering* v. *Northern Coal Co.; Helvering* v. *C. H. Sprague & Sons Co.; Helvering* v. *U. S. Refractories Corp.;* and *Helvering* v. *Oswego & Syracuse R. Co.;* Nos. 18, 19, 20, and 21, October Term, 1933. In those cases, Mr. Justice Roberts disqualified himself, apparently because his former law firm had represented one of the parties in one of the cases. With only eight Justices sitting, the Court affirmed the decision below by a vote of 4-4, 290 U. S. 591. Subsequently, the Court granted rehearing in all of the cases, after the issue which they involved had been decided in an intervening case in which Mr. Justice Roberts participated. See Petition for Rehearing and Annexed Affidavit of Erwin N. Griswold, Esq. in *Ladner* v. *United States,* No. 2, October Term, 1958.

It would surely be wholly unjust to the petitioner in this case for the Court to let its present decision stand, only to be reversed in the *Wilson* case. Accordingly, we urge the Court, if it is not disposed to grant rehearing of the present

case immediately, at least to hold this petition for rehearing pending the developments in the *Wilson* case. While such action might cause some delay in the ultimate disposition of the present case, such delay would cause no injury whatsoever to the Respondent herein.

IV. THE PARTIES ARE IN EVEN GREATER NEED OF A CLARIFICATION OF THE DECISION IN THIS CASE DUE TO THE SUBSEQUENT DECISION OF THIS COURT IN THE *FIBREBOARD* CASE.

On December 14, 1964, three weeks after the decision in this case, this Court held that contracting out, at least in certain circumstances, is a mandatory subject of bargaining. *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, No. 14, This Term, 33 U.S.L. Week 4089. This decision, in holding that an employer has a duty to bargain before laying off its employees and bringing in a contractor's employees to do their work, is directly applicable to many of the contracting out disputes between the Company and the Union. (Indeed, the underlying grievance in the present case involves just such a situation. The Company laid off its crane operators and brought in a contractor's employees to operate the cranes.)

There is already pending before the Board one case in which the Company is charged with contracting out work without bargaining with the Union. *American Oil Company*, 13-CA-5611. In order to decide whether the Company has refused to bargain, the Board must first determine whether contracting out disputes are arbitrable under the parties' collective bargaining agreement. For where an employer has agreed with a union to arbitrate disputes relating to a particular subject, it need not bargain independently of the contractually provided grievance and arbitration procedure. As the Sixth Circuit said in *Timken Roller Bearing Co.* v. *N.L.R.B.*, 161 F. 2d 949, 955-56 (1947):

> "Though the duty to bargain is absolute, it may be channeled and directed by contractual agreement. . . . There is here no restriction in the contract on the obligation of the petitioner to bargain . . . and the petitioner sought not to curtail the process but to utilize the contractual mechanisms for its utilization. . . .
> ". . . [The] effort to channel collective bargaining within the provisions of a contract with the union, was not a refusal to bargain. . . ."

See, to the same effect, *General Motors Corp.*, 149 NLRB No. 40, 57 LRRM 1277, 1279 (1964).

In the present case, the Company contended before this Court that the subject matter of contracting out was not covered by the provision requiring arbitration of grievances as to alleged violations of the agreement or alleged violations of past practice. But it also contended that arbitration was precluded on the ground of collateral estoppel by virtue of the prior litigation. It is impossible to determine which ground this Court relied upon.

The net effect is that it is now impossible for the Board intelligently to decide refusal to bargain cases involving these parties. If this Court has held that contracting out is a subject matter not covered by the agreement, then there is no contractual obstacle to the Board's issuing an order requiring the Company to bargain before contracting out. If, on the other hand, this Court has held only that the Union is barred from proceeding by collateral estoppel, but has concluded that the subject *is* covered by the arbitration provision in the agreement, then under the Act the Company is not obligated to bargain before contracting out.

In short, determination of a refusal to bargain question may well turn on the meaning of the contract. But this Court's decision leaves the meaning of the contract in doubt. It hardly makes sense to require the parties, as well as the Board, to litigate the meaning of the contract through the courts again, to resolve a question which is already here

and which may be disposed of if this petition for rehearing is granted. Clarification of the decision in *this* case will enable the Board to decide *its* case with some assurance of correctness.

V. IN RETROSPECT, IT APPEARS THAT THIS CASE SHOULD NOT HAVE BEEN PLACED ON THE SUMMARY DOCKET.

When the Court granted certiorari herein, it placed the case on the Summary Calendar. Accordingly, counsel was allowed only 30 minutes for oral argument. Had the Court anticipated that there would be such a sharp division in views among its members, we doubt that it would have placed the case on the Summary Docket. Had we anticipated it, we surely would have asked for more time to present oral argument.

There is no way of knowing, of course, whether more extensive oral argument would have led to a majority opinion, rather than an equally divided court. We believe, however, that this case is of sufficient importance — to the parties as well as to the development of a uniform and coherent federal law under Section 301—to warrant further argument, in the hope that a more meaningful decision can ultimately be reached by this Court.

Respectfully submitted,

WILLIAM BELSHAW
BENEDICT R. DANKO
1450-119th Street
Whiting, Indiana 46394

DAVID E. FELLER
ELLIOT BREDHOFF
JERRY D. ANKER
MICHAEL H. GOTTESMAN
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Petitioner

CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

DAVID E. FELLER